

**KENYAN CITIZENSHIP AND IMMIGRATION ACT NO.
12 OF 2011: A CRITIQUE OF THE WORK PERMIT
REGIME IN KENYA**

By

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DECLARATION

I, **RICHARD KIPKORIR CHERUIYOT**, declare that this Research Paper is my original work and has not been submitted for the award of a degree in any other university.

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DATED.....2018

This Research Paper, entitled, ‘KENYAN CITIZENSHIP AND IMMIGRATION ACT NO. 12 OF 2011: A CRITIQUE OF THE WORK PERMIT REGIME IN KENYA,’ has been written and for examination with my approval as the candidate’s supervisor.

This paper has been submitted for examination with my approval as University Supervisor.

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I acknowledge the efforts of my supervisor, Dr. Jackson Bett, for his supervision. I have benefited from his supervision and mentorship. I thank my family for support and understanding, I am forever indebted to them.

DEDICATION

I dedicate this study to my loving wife Hilda Kagongo for her selfless love, encouragement and motivation. To my loving children Allan, Bradley, Cyril, Jeanelle, Jayden, Dalae and Debra for their love and for allowing me time away from home in pursuit of this milestone. To my parents for their continual prayers. To my siblings, especially Emily Jelagat for always urging me on even in difficult circumstances.

LIST OF ABBREVIATIONS

| | |
|------------|---|
| ICESCR | International Convention on Economic, Social and Cultural Rights |
| ITT | International Technology Transfer |
| KC & IA | Kenya Citizenship and Immigration Act No. 12 of 2011 |
| KC & FNMSA | Kenya Citizen and Foreign Nationals Management Service Act No. 31 of 2011 |
| NGO | Non-Governmental Organizations |
| PDC | Permit Determination Committee |
| R & D | Research and Development |
| RA | Refugees Act No. 13 of 2006 |
| RPA | Registration of Persons Act Cap 107 |
| UN | United Nations |
| WTO | World Trade Organization |

LIST OF NATIONAL STATUTES AND INTERNATIONAL INSTRUMENTS
International Instruments

Charter of the United Nations.

International Covenant on Economic, Social and Cultural Rights 1966.

National Statutes

Kenya Citizen and Foreign Nationals Management Service Act No 31 of 2011.

Kenya Citizenship and Immigration Act No 12 of 2011.

Refugee Act No 13 of 2006.

The Registration of Persons Act (Cap 107).

Kenya Citizenship and Immigration Regulations 2012.

South African Statute

Immigration Act 2002

United Kingdom Statutes

Equal Pay Act 1970

Health & Safety at Work Act 1974

Immigration Act 1971

Sex Discrimination Act 1975

LIST OF CASES

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CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

Work permit requirements in Kenya are highly complex. A work permit allows a foreigner who has a valid passport from the country of his origin and a valid visa to Kenya to take up employment in Kenya. Kenya employs two separate evaluation and issuance procedures with work permits being used prior to arrival and visa entry has been issued. Prior to the enactment of the 1968 Immigration Act, Chapter 172 laws of Kenya (now repealed), work permits were not required for employment of foreigners in Kenya.

The British colonial government treated Kenya as an extension of Britain during the colonial period and the laws that applied to the citizens of Britain in Britain applied to the Kenyan colony. The British and Indian Nationals who were either brought to work in Kenya or came to Kenya seeking employment opportunities were subjected to the laws applicable in England. After independence, the Kenyan government did not address the question of immigrants coming to Kenya through the establishment of the work permit regime until 1968 when the Immigration Act was enacted. During this time entry of immigrants to Kenya was unrestricted.

Since 1968 however, individuals crossing borders into Kenya for employment need work permit over and above the need for passports and visas. The Kenya Citizen and Immigration Act No 12 of 2011 hereinafter referred to as KC & IA, currently regulates the work permit regime in Kenya. KC & IA seeks to achieve the following three main objectives regarding employment of immigrants in the Kenyan job market:

- i) Protect employment opportunities available in Kenya for the citizens of Kenya by controlling the entry of foreign nationals seeking employment in Kenya;

- ii) Protect employment opportunities available in Kenya for the citizens of Kenya by prohibiting employment of illegal immigrants; and to
- iii) Encourage and promote transfer of skill and technology through employment of foreign nationals who possess skills and qualifications that are not available in Kenya and whose engagement in that employment will be beneficial to Kenya.

The KC & IA makes provisions that provide for the procedure to be followed in applying for work permits and invalidation of work permits, creates the duties and obligations of employers seeking to employ foreign nationals, vests certain powers on the immigration officers and creates a dispute settlement mechanism to help achieve the above stated objectives.

The immigration department is however rife with horrendous tales of corruption in the issuance of work permits, escalating work permit fees, delays in issuance of work permits, randomness or inconsistencies in the decisions leading to the issuance of work permits, invalidation of work permits or refusal of work permits, complexities occasioned by bureaucracies and lack of transparency in the entire process

This study focused on the efficacy of the KC & IA in achieving its above stated objectives with special focus on the application and issuance of class D work permits to foreign nationals. For instance, in the case of Chinese nationals, a number of Chinese companies bankrolled by their government have recently won a number of construction tenders in Kenya, and which financing was tied to having the Chinese nationals conduct the construction exercises. These construction tenders include the completed Thika super highway that was constructed by China Wu Yi Company limited, The Nakuru-Eldoret Highway and The University of Nairobi Towers that are under construction by the same company, the Hazina Trade Centre owned by National Social Security Fund (NSSF) and under construction by China Jiangxi International (K) Ltd. These

construction companies execute their assignments using both Kenyan and Chinese Nationals.

However, there is a clear imbalance in the working system as it is only Kenyan nationals who are doing what can loosely be described as unskilled menial jobs such as driving the construction machines, laying the construction materials, mixing the construction materials, loading and unloading construction material that require little or no skill at all whereas the Chinese Nationals do what appear to be the more technical or what this paper will regard as skilled work.

The study took into account the provisions of the International Covenant on Economic, Social and Cultural rights of 1966 hereinafter referred to as ICESCR to which both Kenya and China are signatories¹. This consideration was made to discount any argument that the enactment of immigration laws restricting entry of immigrants into the Kenyan job market is inconsistent with the international obligations of Kenya under ICESCR.

Article 2 of ICESCR requires that in order to achieve the full realization of rights recognized by the ICESCR by all appropriate means, state parties are covenanted to progressively, whether individually or through international assistance and cooperation, make laws and policies towards that end. The article also requires that all the rights recognized therein be exercised in a manner that is not discriminatory to any category of persons, whether by colour, race, sex, language, religion, national or social origin, political or other opinion, birth, property or other status. However, the article gives further leeway to developing countries to determine the extent of guaranteeing economic rights based on their national economies. It is therefore evident that whereas the covenant rights apply to both nationals and non-nationals pursuant to this Article, the provisions and in particular provision (3) above, makes Kenya perfectly entitled to regulate

¹ United Nations, 'International Covenant on Economic, Social and Cultural Rights' (United Nations General Assembly 1966) <<http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 22 October 2014.

the issue of work permits by law as she has a margin of appreciation, that has to take into account the needs of her nationals and also take into account the national interests including security concerns. This power has also been granted to the Kenyan government by dint of the Constitution of Kenya 2010 under Article 2(5).

In Nairobi High Court Miscellaneous Case No 1652 of 2004 between *Republic v Minister for Home Affairs & 2 others Ex-Parte Leonard Sitamzee*,² the applicant filed an application for judicial review. The applicant was a Cameroonian national married to a Kenyan lady. The applicant conceded that he needed a work permit in order to engage in any gainful employment in Kenya. The applicant however contended that he had complied with the requirements of Rule 22 of the Immigration Act, Chapter 172 Laws of Kenya (now repealed) but the minister for Home Affairs and the Principal Officer had refused to positively consider the applicants request for class “H” permit. The applicant cited the provisions of ICESCR in support of his arguments. Justice G Nyamu in his judgment inter alia held that:

*“Having made the observations in 9 above I wish to add that work permits are not automatic entitlements and have to be issued in accordance with the domestic law and each state does have a margin of appreciation to take into account local needs and circumstances before granting them. Each application has to be considered on its merit and in accordance with the provisions of the Immigration Act. A temporary residence permit or work permit or any other permit specified in the Immigration Act to an alien or non-national spouse could be refused on reasonable grounds and in the national interests...”*³

Work permit arrangements in Kenya makes provisions for the classifications of work permits application procedures (forms, informational and documentary requirements, selection criteria),

² *Republic v Minister for Home Affairs & 2 others Ex-Parte Leonard Sitamzee* (High Court Miscellaneous Case No 1652 of 2004).

³ Ibid.

administrative procedures (methods of assessment, how verification of documents occur, arrangements for interviews, processing time), allocation through various qualitative and quantitative restrictions on work permits issuance and rules on how permanent residency is attained. Other issues covered include transparency in procedures covering status inquiry procedures, notification of delays and inquiries as to grounds for rejection. Further complexities arise due to work permit exemptions and waiver programs permitted within the immigration laws. The study sought to establish how, if at all, the law has been able to regulate the movement of the foreign migrant workers into Kenya taking into account the objectives set out in the Act, and if not, what gaps and challenges faced the implementation of the work permit regime.

1.2 Statement of the Problem

Although there is a work permit regime in Kenya, as established by the Constitution of Kenya 2010, the Kenya Citizenship and Immigration Act 2011, and the numerous international treaties that Kenya is party to, Kenya still faces an unchecked influx of foreign workers to the detriment of the local population. Questions, therefore, abound on what the work permit regime in Kenya entails, what its effectiveness is and what gaps and challenges befell the work permit regime. This study therefore sought to interrogate the work permit legal framework in order to establish their effectiveness in attaining its objectives, the reasons for its inability to achieve its objectives, if at all and what needs to be done to improve its efficacy for benefit of Kenyan locals who will eventually gain from increased foreign investments and transfer of technology and skill.

1.3 Objectives of the Research

The overall objective for this study was to establish the effectiveness of the work permit regime as contained under the Kenya Citizenship and Immigration Act 2011, and whether the objectives of work permits had been attained.

Specific objectives pursued under this study included conducting:

- i) An analysis of the existing legal framework on the issuance of work permits in Kenya, and how this legal framework has evolved over the years;
- ii) An analysis of the gaps and challenges facing the implementation of the work permit regime in Kenya; and
- iii) A comparative analysis with work permit regimes of South Africa and United Kingdom with a view of extracting recommendations for the betterment of Kenya's work permit regime.

1.4 Research Questions

This study sought to answer the following questions:

- i) What is the legal framework on the issuance and processing of work permits in Kenya and how has this framework evolved over the years?
- ii) What are the gaps and challenges bedevilling the work permit regime in Kenya, if any?
- iii) What can be lessons can be drawn from South Africa and the United Kingdom essential for the betterment of work permits regime in Kenya?

1.5 Hypotheses

This study was based on the following assumptions:

- i) The evolution of the legal framework on work permit regime in Kenya affects its present application to this day;
- ii) There are gaps and challenges affecting the implementation of the work permit regime in Kenya;
- iii) Lessons drawn from United Kingdom's and South Africa's experiences on work permit regime can be applied in solving some of the challenges facing work permit regime in Kenya.

1.6 Research Methodology

This section outlines the choices made about the cases studied, methods of data collection, processes involved, sampling methods, system of analysis and ethical considerations during the study.

1.6.1 Research Design

This study employed both qualitative and quantitative approaches in collecting data.

1.6.1.1 Qualitative Approaches

The study chooses qualitative research design because it allows for an in-depth description and understanding of the actions and behaviours of the participants as it attempts to study human actions from the perspective of the participants themselves. It also involves a small number of cases to be studied. Additionally, it is flexible because it allows the researcher to modify his/her

plan at any time while it also allows for both greater spontaneity and the adaptation of the interaction between the researcher and the participants in the study⁴.

The data collected through the qualitative approach is descriptive while the interview occurs in a natural setting. One of the salient features of qualitative research is that its procedures are particular, and therefore non-repetitive. Qualitative research focuses on interaction process and events, thus allowing the researcher to be involved and to provide the authentic information that is always essential. Qualitative research also allows for the construction of the social realities and cultural meanings while it is possible to analyse data, which has been collected using fewer figures.⁵

There are other reasons why the study chose qualitative research. Maykut and Morehouse⁶ argue that qualitative research enables an exploration of people's words, actions and behaviour in order to narrate and describe these words, actions and behaviours in ways that will both represent and make it possible to understand the different situations as they are understood and experienced by the participants. Qualitative research aims at taking into account matters of context in a sensitive way in order to understand the essence of a situation or phenomenon in its own environment. The objective of qualitative research is therefore to understand the way in which the participants view both the world in which they live and those around them. In qualitative research the relationship between the researcher and the participant is relaxed and informal and the participants are thus more at ease while they have the opportunity more elaborately and in

⁴ Babbie E and Mouton J, *The Practice of Social Research* (Oxford University Press 2001).

⁵ Neuman W.L, *Social Research Methods: Qualitative and Quantitative Approaches* (3rd Edition, Allyn and Bacon 1997).

⁶ Maykut P and Morehouse R, *Beginning Qualitative Research. A Philosophic and Practical Guide* (The Falmer Press 1994).

greater detail as compared to quantitative research. Moreover, the researcher is able to follow up immediately on any issue that he/she feels need greater clarification.

1.6.1.2 Quantitative Approaches

Quantitative research, because its explorative nature, allows for open ended and semi-structured questions, which probing gives the participants the opportunity to respond in their own words without being coerced by particular set of questions as often is the case in quantitative research. Babbie and Mouton⁷ argue that quantitative research is used in order to gain insights into attitudes, behaviours, value systems, concerns, motivations, aspirations, culture or lifestyle of different people. It is therefore manifestly clear that this type of research may be used to inform the state and business decision process, policy formation, communication and research in a qualitative way. This study will use in-depth interviews, content analysis, evaluation and analysis of any unstructured material such reports, media clips, circulars and other useful documents.

A minimum of two respondents responsible for the processing and issuance of work permits were selected from the Department of Immigration, the Ministry of Labour, the Ministry of Education, and KenInvest Corporation. Responsible department heads and figure heads were also selected from some of the foreign companies working in Kenya on various projects, particular emphasis was placed on the numerous Chinese companies working in Kenya owing to their large numbers and contribution to foreign direct investment in Kenya.

1.6.2 Sampling Methods

The study employed the non-probability sampling method together with the snowball sampling technique. I used my existing social networks as an advocate who has participated in the creation

⁷ E and J (n 18).

of a number of legal instruments involving a number of Chinese construction companies to identify participants.

The snowball sampling technique is useful to the study because it is often considered as a form of accidental sampling due to its chain referral system. The researcher exploited this chain referral system by following up the referral and interviewing the new people until he/she reaches saturation point.⁸

1.6.3 Sample

The study was conducted in Nairobi using participants from officials responsible in the issuance of work permits under the Immigration Department, Ministry of Labour, Ministry of Education and the KenInvest Corporation. Further, the study interviewed the management and the employees of the chosen Chinese construction companies. In this study, the selection of the participants from the immigration and the other line related departments was based on their involvement on the processing of class D work permits and how long the person has worked in the department.

Preference was given to those specifically sitting in the decision-making panel of the work permit process. The panellists are drawn from the Immigration department, Education and Labour ministries as well as the KenInvest Corporation. Further, key consideration was given to personnel with over five years. The choice of the Chinese Construction companies was based on the companies that have successful tendered for construction works and have either completed or have substantially undertaken their assignments.

⁸ Ibid.

1.6.4 Data Analysis

In order to ensure that the data analysis proceed smoothly, the study compiled a summary of the results of each interview including describing the participant in detail, and noted other practical details pertaining to the interview including time, place, duration of the interview, the participants behaviour and mannerisms as well as themes that emerge from the interview.

The study used qualitative data analysis in order to draw conclusions and assess the results from the research study. This is because as Neuman⁹ explains, qualitative data analysis is important in that it allows for the formation of new concepts and theory by bringing together empirical evidence.

1.6.5 Ethical Considerations

May explains that the word ‘ethics’ often suggests a set of standards by which a particular group or community decides to regulate its behaviour to distinguish what is legitimate or acceptable in pursuit of their aims from what is not. The study therefore adhered to certain rules some of which are discussed below to protect the participant’s right to privacy.

1.6.5.1. Consent of participants

The study sought to secure the interviewees’ consent in writing, to participate in the study and their consent as to the way in which the information they provide will be used. The study also sought to explain to the participants the topic of research, why they were chosen and how they made their contribution to the research.

1.6.5.2. Anonymity and Confidentiality

⁹ Neuman W.L, *Social Research Methods: Qualitative and Quantitative Approaches* (3rd Edition, Allyn and Bacun 1997).

The study sought to protect the participants from unwarranted harm or publicity. The study did not use names of the participants and shall instead use pseudonyms. This position is informed by the arguments that social science research should never injure the people being studied regardless of whether they volunteer for the study or not.

1.6.5.3. Compensation and Acknowledgement

The study did not compensate and of the participants financially. The study did not make any promises either material or otherwise to the participants, as the study would not be able to fulfil the promises. However, the study acknowledged the participants using the designated pseudonyms.

1.6.5.4. Analysis and Reporting.

The study reported information and highlighted any limitations and shortcomings pertaining to the study accurately. The study clearly referenced all the works of other researchers upon which the study will draw information and give such researchers credit where their work is referred.

1.7 Theoretical Framework

The study was premised on two interrelated theories, John Hobbes' social contract theory and Jeremy Bentham's utilitarian theory.

The social contract theory by John Hobbes is of the view that moral and political obligations of persons are dependent upon an agreement or a contract among themselves to form the society wherein they live.¹⁰ Socrates uses titbits of social contract theory in explaining to Crito why he

¹⁰ John Hobbes, *Leviathan* (1651).

must remain in prison and face the death penalty.¹¹ The first full exposition and defense of social contract theory, nevertheless, is of recent origins, by John Hobbes,¹² John Locke¹³ and Jean Jacques Rosseau.¹⁴ In applying social contract theory to this study, the employer notionally agrees to disclose or transfer special skill, training or technology the potential employee by way of assimilating and training a local person in consideration or in exchange for the grant of a work permit for a specified period of time on the payment of the prescribed fees. It is expected that the employer would recoup the cost and profit from their investment of labour, time and ingenuity in the employment within the term of the work permit. This study analyses whether the social contract theory, as delegated by the Kenyan people, and upon the granting of the work permit regime by foreigners, is upheld by both parties.¹⁵

On utilitarian theory, Jeremy Bentham posits that has placed pain and pleasure as the ultimate governor of mankind's decision.¹⁶ It is for mankind to what to do based on the principle of avoiding or reducing pain, while increasing pleasure. This is the cornerstone of the principle of utility. Bentham went further to develop a 'felicific calculus' aimed at testing the happiness factor of any action, system or legal regime. Those actions, systems or regimes with the least happiness index would then be abandoned, albeit gradually through systemic changes, in favour of those with higher happiness index.¹⁷ In applying this theory, this study will seek to analyse and report whether the work permit regime in Kenya has a positive utilitarian outlook, or whether the pains caused by the work permit regime far exceeds its benefit. It thereafter uses the findings to present an opinion for the review of the work permit regime in order to achieve a

¹¹ Plato, *Five Dialogues* Hackett Publishing Company (1981).

¹² John Hobbes, *Leviathan* (1651).

¹³ John Locke, *Two Treatises on Government and a Letter Concerning Toleration* Yale University Press (2003)

¹⁴ Jean Jacques Rosseau, 'Discourse on the Origin and Foundations of Inequality Among Men' (1755).

¹⁵ Ibid.

¹⁶ Jeremy Bentham, 'An introduction to the Principles of Morals and Legislation' (University of London 1782).

¹⁷ Ibid.

higher happiness index. The other influential contributor to the theory of utilitarianism was John Stuart Mills.¹⁸

1.8 Literature Review

The central issues that emerge from the literature on work permit legal regime can be summarized as: the need to regulate the entry and employment of foreign nationals in the host state so as to protect the job opportunities of the citizens of the host state; and the need to encourage and promote transfer of new skills and technology into the host state through employment of foreign nationals seized with specialized skills not available to Kenyans and training of Kenyan citizens as entrepreneurs of the said foreign nationals. Closely connected to this is the need to eliminate the potential of illegal immigrants seeking and gaining gainful employment in the host state.

Vertovec¹⁹ describes a 'skilled migrant' as a migrant either in possession of a tertiary degree or else with extensive, specialized work experiences. A 'skilled worker', in the context of this research, refers to someone with formal educational qualifications and who is probably working in the formal sector, while 'unskilled worker' does not possess any formal qualification and is usually working in the informal sector.²⁰ This study will use this definition in the analysis of who is legible for classification as a skilled migrant. On this, Wocke and Klein²¹ maintain that it would appear that there is a higher tendency on the part of the skilled workers to migrate than unskilled workers, and that migrants are usually more educated than the rest of the population in their country of origin. The assumption of Wocke and Klein provide a basis for this study's

¹⁸ See, for instance, John Stuart Mill, *On Liberty*, ed Gertrude Himmelfarb (Harmondsworth: Penguin Books 1974).

¹⁹ Vertovec S, *Transnational Networks and Skilled Labour Migration* (Gottlieb Daimler-und Karl Benz-Stiftung 2002) 14-15.

²⁰ Ibid.

²¹ Wocke A and Klein S, 'The Implications of South Africa's Skills Migration Policy for Country Competitiveness' (Development Southern Africa 2002).

consideration that highly skilled workers should be allowed into the country and be granted work permits for the purpose of effecting transfer of technology and skills.

Cross, Seger, Wentzel, Mafukidze, Hoosen and Van Zyl²² observed that there is a perception worldwide that foreign nationals who leave their country of birth and cross borders in search of work all possess certain characteristics, including being highly motivated, enthusiastic and committed, as well as being better educated compared to the locally born workers in their host countries.²³ They indicated that this phenomenon is most prevalent in the United States of America. They further argue that Moreover, there is also a popular misconception that migrants take up the jobs of the locals and depress wage levels. They argue that this perception is erroneous because it is based on the incorrect assumption that the number of jobs in any country is fixed and that the influx of more workers will, therefore, diminish the number of jobs available.²⁴ This view is also applied and supported by this study with the sole aim of ensuring that highly skilled workers be granted higher chances for mobility in order to ensure transfer of skills and technology.

Wocke and Klein²⁵ further suggest that the World Bank has noted the trends that unskilled workers are increasingly, migrating in order to take up the unskilled manual jobs that local workers wish to avoid. This type of migration they argue accounts for almost seventy (70) percent of labour flows, although much of it is both illegal and unregulated. However, Pearson and Morrell²⁶ write that:

²² Cross C and others, *Migration Management Challenges in South Africa: The next Ten Years* (HSRC Press 2009).

²³ Ibid.

²⁴ Ibid.

²⁵ Wocke A and S (Supra).

²⁶ Pearson R and Morrell J, 'Knowledge Migrants: The Motivation and Experience of Professionals in the UK on Work permits (European Migration Network 2007).'

The global mobility of skilled workers has increased in the recent years due to the expansion of the knowledge economy, the progressive globalization of markets and companies, the regional trade arrangements, the growing demand for scarce skills, and wider political and economic issues. As many Western Countries encourage inward migration as a means of easing domestic skill constraints, there has been growing debate about the motivations and consequence of such migration.²⁷

There are therefore clear indications that there are a number of migrants both skilled and unskilled that have come to Kenya from different parts of the world in search of better job opportunities and thus a better life.²⁸ These migrations are both illegal and unregulated on the one hand and legal and regulated on the other. However, economic migration is not a unique phenomenon in Kenya. The other countries of the world also grapple with immigration issues similar to Kenya. Through the analysis provided by the Wocke and Klein, this study proposes a careful enhancement of the local laws in order to ensure that swathes of unskilled foreign workers do not prevent the movement of the more legitimate and much needed highly skilled personnel, and they do not also affect the development of the local labour market.

Daniel²⁹ argues that the key consideration of the now repealed Immigration Act in regulating foreign labour was to protect the job opportunities available in Kenya for Kenyan citizens. He contended that after independence, there was urgent need to *kenyanize* the job market in Kenya through employment of locals in all the available opportunities.³⁰ He conceded that there were instances where there were no Kenyans adequately trained in the various job opportunities and stated that it is only in such instances that foreign nationals could be employed. Citing the now repealed Immigration Act, he argued that every effort must be made to ensure that adequate

²⁷ Ibid.

²⁸ Ibid.

²⁹ Daniel Arap Moi, *Statement on Application of the New Immigration Act in Relation to 'Work Permits' and Kenyanization* (Oxford University Press 1968) 10.

³⁰ Ibid.

numbers of Kenyan nationals are trained in those areas taken up by foreign nationals.³¹ This analysis is necessary and is supported for the sake of empowering and enhancing the local populations with skills from foreigners.

Chi-Yung (Eric) and John³² while discussing whether GATS/WTO can help in dealing with visas and work permit problems or whether a new global entity is needed concede that WTO cannot be an ideal instrument to deal with visas and work permits because WTO for instance stresses non-discrimination while most visa and work permit practices are highly discriminatory and will likely remain so. The discrimination in their view is almost always in favour of the nationals of the host state and is tilted against foreign nationals, the principal consideration being protection of the job opportunities for the nationals of the host state. They further argue that WTO focuses on bindings and reduction in trade barriers and less on removing unnecessary bureaucratic impediments, which are specific to visas, and work permits.³³

Regarding the UK Immigration system, James and John³⁴ explain that the main mechanism of managing labour immigration in the United Kingdom is the work permits system. They state that restrictions on foreigners seeking work in the UK were first introduced during the First World War. In 1919-1920 a system of work permits was brought in which laid down conditions to regulate the employment of non-Commonwealth foreigners. They further explain that in 1962, UK enacted the Commonwealth Immigration Act of 1962, which brought countries from the Commonwealth within the regulation of the foreign labour. UK currently regulates all forms of foreign labour within its territory through a raft of laws and regulations. This system was

³¹ Ibid.

³² Chi-Yung (Eric) Ng and John Whalley, 'Visas and Work Permits: Can GATS/WTO Help or Is a New Global Entity Needed?' (University of Western Ontario 2004).

³³ Ibid.

³⁴ James Clarke and John Salt, 'Work Permits and Foreign Labour in the UK: A Statistical Review' (Labour Market Trends 2003).

thereafter carried on to all colonies of the UK, Kenya included.³⁵ The analysis of the UK provides the understanding of the origins of Kenya's immigration and work permit laws. These laws are necessary to protect local markets and allow for the build-up of local, skilled labour capacity.

Wocke and Klein³⁶ suggest that the World Bank has noted the trends that unskilled workers are increasingly, migrating in order to take up the unskilled manual jobs that local workers wish to avoid. This type of migration they argue accounts for almost seventy (70) percent of labour flows, although much of it is both illegal and unregulated.³⁷ They argue that this labour flow is the main reason for the presence of illegal immigrants in a number of countries and is one of the biggest challenges of the immigration laws the world over. This analysis provides reason for the review and proper enforcement of the work permit regime in Kenya.

On the question of the transfer of technology, Jack³⁸ argues that Brazil has designed a broad variety of mechanisms to implement its technology development objectives. In this regard Brazil he argues has drawn a fundamental distinction between importation of readymade technology and effective transfer of technology. He argues that the latter is viewed in Brazilian policy as a process involving several steps namely: a) knowledge of what technology is needed; b) knowledge of how to negotiate for it on advantageous terms; c) the capability to adapt and adopt a newly acquired production systems; and d) the ability to reproduce or create technology in selective areas.³⁹ He further argues that Brazil has established certain bureaucratic organizations

³⁵ Ibid.

³⁶ Wocke A and Klein S, 'The Implications of South Africa's Skills Migration Policy for Country Competitiveness' (Development Southern Africa 2002).

³⁷ Ibid.

³⁸ Jack Baranson, *North-South Technology Transfer: Financing and Institution Building* (Lomond Publications Inc 1981) 55.

³⁹ Ibid.

or revitalized existing organizations through new capabilities and assignments of new responsibilities. For instance, Brazil has expanded and strengthened tax collection authority and the education system has similarly been enlarged and reoriented towards production of trained manpower. He gives an example of SENAI program (National Service for Industrial Apprenticeship) formed in 1942, and supported by one percent payroll levy on all industries and the National Program for Executive Training (PNTE) aimed at improving and upgrading management capabilities among the national enterprise, public and private.⁴⁰ The immigrant experts brought into Brazil owing to their expertise or skill are therefore able to disseminate knowledge to the nationals of Brazil through this integrated national system that has been put in place to facilitate the aforesaid technology transfer.⁴¹ Through this study, Kenya is urged to ensure that the local population is well endowed with the skills that the foreigners workers came to impart. This will ensure the continuity of the local industries and markets.

David and Raymond⁴² argue that technologies that impact intellectual processes require extensive learning and practice. To integrate new technologies into the execution of their tasks they argue, professionals must spend time not only learning the technologies and methods they embody, but must also gain experience by actually using them in sample problems in order to gain confidence that these tools can be used in actual practice.⁴³ They argue that the solution lies in establishing technology support structures and mechanisms in the receiving state such as apprenticeship organizations and funding of the training of manpower. This study, in supporting the authors, argue that transfer of skill and technology should be a precondition to the granting of

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² David Gibson V. and Raymond Smilor W., *Technology Transfer in Consortia and Strategic Alliances: Technology Transfer in Knowledge-Intensive Organizations* (Rowman & Littlefield Publishers, Inc. 1992) 96.

⁴³ Ibid.

the work permits in Kenya.

Kamal⁴⁴ on the other hand argues that the central issues regarding technology transfer are the presence of asymmetric information. He argues that the asymmetric information dynamics can hamper the efficient working of markets. To put it in simpler terms, the discourse revolves around how one possessing useful information or technology can convey to the uninformed party the value of the information, which the latter lacks. He argues that the logical problem is that as soon as the valuable information is shared the basis of the trade disappears since both parties know the same thing.⁴⁵ He argues that the logic no doubt over simplifies the issue, but captures a fundamental aspect of technology transfer. Namely, that asymmetric information can lead to large transaction costs that can stifle market mediated technology transfer. He therefore advocates for some regulation of technology transfer to address the failure of the market to deliver cost effective ITT.⁴⁶ Kamal's argument is equally and rightly applicable in this study as it will help in the transfer of skill and technology to Kenyans.

Sherman⁴⁷ posits that an important consideration in the acquisition of foreign technology is that the process is highly problem-or need-specific. Typically, he argues, a well-defined problem or need exists for which a technology solution is sought.⁴⁸ He argues that the options are either to seek and apply technological solutions developed by others or to initiate research and development to try to solve the problem locally. He further argues that the acquisition of technology developed by others being highly demand responsive means that the decision to do so usually are carefully weighed and reached only after extensive and comprehensive search and

⁴⁴ Kamal Saggi, *International Technology Transfer to Developing Countries* (Formara Ltd 2004) 71.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Sherman Gee, *Technology Transfer, Innovation, and International Competitiveness* (John Wiley & Sons 1991) 13.

⁴⁸ Ibid.

evaluation of candidate technologies for technical and economic appropriateness.⁴⁹ He contends that, the likelihood that the technology finally selected will meet the problem requirement is much higher than when relying on one's own R & D in as much as the results of R & D are subject to many uncertainties and the probability of eventually reaching successful application is low. He argues that the answer lies in developing ways to use available technology resources more effectively to produce more innovative goods rather than in raising higher the protectionist curtain.⁵⁰ He further argues that the importance of these considerations is of course not limited to the industrial scene. He contends that they are very much areas of foremost concern to the government and program managers. Through Sherman, we are able to understand that not all technology is necessarily to be considered as a candidate for transfer into Kenya, rather only that technology that is necessary for the furtherance of the objectives of Kenya should be considered, whether these objectives be social, political or economic in nature.

The other scholars who have weighed in with contributions also include Robert and Harvey⁵¹. They contend that as a primary source of technologies, multinational firms have played a central role in the international transfer of technology.⁵² They argue that multinational firms are one of the most important elements of the equation of ITT currently under analysis and of the debate in their role of relating suppliers and users.⁵³ They however argues that, the debate generally ignores or overlooks the needs and abilities of the receiver firms, and the role of the national environment in encouraging technology search, acquisition and local adaptation and development. They posit that by focusing on the neglected area of the debate, much can be

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Robert Driscoll E. and Harvey Wallender W., *Controlling International Technology Transfer: Policy Perspectives and Implications, Control and Incentives for Technology Transfer: A Multinational Perspective* (Pergamon Press 1981).

⁵² Ibid.

⁵³ Ibid.

accomplished in encouraging improved technology transfer by multinational corporations while at the same time making application of those technologies more supportive of national development goals.⁵⁴ Like Sherman, the study by Roberts and Harvey is necessary in guiding the nature of technology or skill transfer that should be acquired. It is understood that not all technology or skill is necessarily aligned to the goals of the country.

1.9 Justification

The regulatory framework of the issuance of work permits is necessary to ensure that a sovereign state is able to guarantee safety and protection of the job opportunities for domestic benefits of her people in exercise of its principle of permanent sovereignty over its resources and wealth.⁵⁵ This is largely because the international nature or the globalization of the labour market and the investment trends have the tendency of compromising and the failure of the market to ensure just and fair allocation of labour across countries has made it necessary for individual states to formulate work permit regimes to regulate the entry of foreign nationals to its job market.

This study therefore comes at an opportune time is helping readers and other stakeholders within the legal and immigration departments understands the gaps in the Kenyan immigration laws in order to help them combat the present failure of work permit regime in Kenya. The study will be helpful in analysing the existing laws on work permit regime. It will also look at the gaps and challenges bedevilling the administration of work permits in Kenya. In doing so, this study will provide massive literature which will be a source of scholarly information on how to effectively administer work permits in Kenya for the benefit of her citizens. In providing information on what South Africa and the United Kingdom have done to combat similar work permit challenges,

⁵⁴ Ibid.

⁵⁵ Franz Xavier Perrez, 'The Relationship between "Permanent Sovereignty" and the Obligation Not to Cause Trans boundary Environment Damage' (Environmental Law 1996).

this study will propose a raft of changes that can be gleaned from those jurisdictions in order to effectively manage work permits in Kenya.

Moreover, as not so many scholars have looked into the effectiveness of work permits in Kenya, this study forms a starting point for the analysis of all work permit related issues in Kenya, in order to open the way for more in-depth study on work permits.

1.10 Delimitations

In as much as the researcher recognizes that work permit process is broad, and probably interagency and interdisciplinary, to the extent that a pure legal inquiry may not fully answer questions as to the limitations and solutions to the work permits regimes, this study restricted itself to:

- i) Analysing and reviewing the existing work permit legal framework in Kenya;
- ii) Conducting interviews on officials of the Immigration Department, Ministry of Labour, Ministry of Education, KenInvest Corporation, and other important players in the work permit arena in Kenya.
- iii) The analysis and review of work permit legal frame works of United Kingdom and South African legislative developments.

1.11 Chapter Breakdown

1.11.1 Chapter one

Chapter one laid the basis of the study, which included: the background to the study; the statement of the problem; theoretical framework; literature review; objectives of the study;

research questions; research hypothesis; justification of the study; research methodology; and the delimitations of the study.

1.11.2 Chapter two

Chapter two analyses the applicable legal provisions relating to work permits in Kenya while looking at the historical basis of the current provisions. This analysis provides a basis for considering the gaps and challenges that have otherwise arisen from the operationalisation of the work permit regime in Kenya.

1.11.3 Chapter three

Chapter three presents an analysis of the gaps and challenges bedevilling the work permit regime in Kenya.

1.11.4 Chapter four

Chapter four discusses the work permit regime in the United Kingdom and South Africa and with a view of highlighting the salient differences between the laws and the practices of work permits in the United Kingdom and South Africa and those of Kenya in order to identify lessons and best practices as a way of benchmarking the Kenyan law and responding to the gaps and challenges that were identified in the preceding chapters.

1.11.5 Chapter five

Chapter five provides a conclusion to the study. It responds to the research hypothesis and makes recommendations for reform of laws, regulations or policy on work permit regime in Kenya.

CHAPTER TWO: LEGAL ANALYSIS OF WORK PERMIT REGIME IN KENYA

2.1 Definition of Work Permit

The Kenya Citizenship and Immigration Act defines the work permit as a permit issued under section 40.⁵⁶ James and John define work permit as a permit granted to an employer on behalf of a non-citizen foreign worker, living outside the host country at the time of the application, whom the employer wishes to employ.⁵⁷ This definition suggests that, assuming the employer and worker meet the requirements set out by the work permit, the work permit is granted for that worker to enter the country to work for that employer, in the particular job specified in the application for a set period of time. This also means that if there are any changes to the job, the employer must notify work permits.

2.2 The Law and Practice

The work permit regime in Kenya is provided for in section 40 and 41 of the KC & IA, as read together with other provisions of the Act. The regulation of the entry of migrants into Kenya seeking employment opportunities is in the exercise of the well-celebrated principle of state permanent sovereignty⁵⁸. States exercise their permanent sovereignty over natural wealth and resources including labour market within their boundaries in the best interests and wellbeing of their people and in conformity with the rules and conditions which nations freely consider being necessary or desirable. The Principle of permanent sovereignty gives states the rights and obligations to control the exploitation and use of their natural resources for the benefit of their citizens.

⁵⁶ 'Kenya Citizenship and Immigration Act'. See section 2(1) of the Act on Interpretation.

⁵⁷ *Ibid*.

⁵⁸ 'United Nations Charter'. Article 1-3 immortalizes this principle. Sovereignty connotes self-determination and the prohibition against the threat or use of force as *jus cogens* norms of modern international law. The United Nations Charter, the Draft Declaration on Rights and Duties of States, and the charters of regional international organizations express the view that all states are juridically equal and enjoy the same rights and duties based upon the mere fact of their existence as persons under international law. The right of nations to determine their own political status and exercise permanent sovereignty within the limits of their territorial jurisdictions is widely recognized.

The principle of state permanent sovereignty over natural resources emphasizes states domestic jurisdiction to regulate the labour market for domestic benefits of her people without exempting it from other rules or principles of international law.⁵⁹ This position was echoed in the Nairobi High Court Miscellaneous Case No 1652 of 2004 between *Republic v Minister for Home Affairs & 2 others Ex-Parte Leonard Sitamzee* where the court held that “... a non-national such as the applicant cannot properly argue that the right is absolute because it is the subject to the margin of appreciation accorded to each state and also subject to the national interest including security concerns. The need to comply with the requirements of the immigration laws and regulations is embraced by the article.”⁶⁰

The aforesaid provisions (section 40 and 41 Of KC and IA) in the affirmation and exercise of the aforesaid state permanent sovereignty make classification of the various work permits. This classification relates to type of work permit and the length of stay. There are eight types of work permits classified as Class A-M.⁶¹ These classes of work permits have a term of five years from the date of the issuance or renewal on diverse terms to be determined by the director of immigration.⁶² The scope of this study is limited to class D permits. The Act provides for the application procedures, (The application procedures relate to the forms that must be filled, information to be supplied in the forms, documentary requirements, selection criteria and the fees to be paid.⁶³

The Act also outlines the administrative procedures. The administrative procedures cover the methods of assessment of the applications, how verification of the documents occur, arrangement

⁵⁹ Ibid.

⁶⁰ *Republic v Minister for Home Affairs & 2 others Ex-Parte Leonard Sitamzee* (Nairobi High Court Miscellaneous Case No 1652 of 2004).

⁶¹ ‘Kenya Citizenship and Immigration Act’ (n 25). See Section 36 & Seventh Schedule.

⁶² Ibid, see Regulation 24.

⁶³ Ibid, see section 40 and Regulation 20.

for interviews,⁶⁴ revocation of work permits,⁶⁵ invalidation of work permits⁶⁶, rejection of application, re-application,⁶⁷ variation of terms and conditions,⁶⁸ renewal of work permits,⁶⁹, inspections,⁷⁰ deposit of security,⁷¹ security bond,⁷², general security covenant,⁷³ alteration of security,⁷⁴ issue of warrants of attachment,⁷⁵ on security bond and appeals⁷⁶.

The Act also makes provisions for the allocation rules through various qualitative and quantitative restrictions on work permit issuance and attainment of permanent residency.

2.2.1 Application Procedures

The application procedures for work permit are provided for under section 40 and Regulation 20.

A person wishing to apply for a work permit must first obtain an application package.⁷⁷

Application procedures generally require filling of the forms and collecting documents that are necessary to support the application. Such documents include letters of offer for employment, proof of qualification, work experience, reference letters, photographs of the potential employees, copies of the passports of the potential employees, documents of the employer among many others.⁷⁸

The employer is also required to supply additional exhaustive details about the employer, the nature of the job, details of the efforts made to find local personnel and evidence of failure to do

⁶⁴ Ibid, see section 40(3).

⁶⁵ Ibid, see section 40(4).

⁶⁶ Ibid, see section 40(7) and section 41.

⁶⁷ Ibid, see section 40(7).

⁶⁸ Ibid, see section 40(3).

⁶⁹ Ibid, see Regulation 24.

⁷⁰ Ibid, see Regulation 25.

⁷¹ Ibid, see Regulation 39.

⁷² Ibid, see Regulation 40.

⁷³ Ibid, see Regulation 41.

⁷⁴ Ibid, see Regulation 42.

⁷⁵ Ibid.

⁷⁶ Ibid, see section 40(10).

⁷⁷ Ibid, see section 40 and Regulation 20.

⁷⁸ Ibid.

so, details of the candidate's experience, Skills, training and verification of the personal details. The permit determination committee may request for additional information and where necessary, summon the applicants and require production of further supporting documents.⁷⁹

2.2.2 Administrative and Processing Procedures

The processing of work permit application involves complex administrative procedures. Immigration personnel make initial assessment of applications, which may include checking if application forms are fully and properly completed, relevant documents are attached and certified or notarized whichever is applicable, photographs are of specific size and other requirements are met, payment of applications fees has been made and the bank draft issued in payment of the application fees is valid. If any of the above is not met, the immigration personnel have to write to the applicant to seek compliance.

The application upon satisfaction of the verification process is then scheduled for the deliberation of permit determination committee. The committee evaluates the application and makes a determination as to whether the applicant and the candidate have met the requirements relating to class D work permit.⁸⁰ The committee in the exercise of its made to evaluate the application may request for additional information and where necessary summon the applicants and compel them to produce more supporting documents⁸¹. The committee, upon conducting its deliberations, is mandated to make recommendations to the Director either recommending issuance of the work permit or rejection of the application. The deliberations by the committee are regulated by the procedures formulated by the committee from time to time.⁸² The Director of Immigration is mandated to issue a work permit on the strength of the recommendations of the

⁷⁹ Ibid, see section 40(5).

⁸⁰ Ibid, see section 40(3).

⁸¹ Ibid, see section 40(5).

⁸² Ibid, see section 40 (9).

committee.⁸³ However the Director may decline to issue the work permit, if in the opinion of the Director, issuance of the permit is either injurious to the interests of the country or is inappropriate for any other sufficient reason.⁸⁴ The Director is required to give reasons for rejecting the application in writing to both the applicant and the committee and either:

- a) Refer the matter back to the committee for further consideration; or
- b) Reject the application altogether.

Upon reference from the Director, the committee is required to within fourteen days, re-evaluate the application taking into consideration the reasons given by the director, make its findings to the Director. The Director will then decide whether to grant the work permit or reject the application.⁸⁵ The issuance of work permit is done in a prescribed form and is subject to payment of the applicable fees⁸⁶

The work permit can however be invalidated in instances where the candidate:

- a) Fails, without the written approval of the Director, to engage within ninety days of the date of issue of the permit or enter into Kenya employment in respect of which the permit was issued earlier;
- b) Ceases to engage in the said employment; or
- c) Engages in any employment whether or not for remuneration other than the employment in respect of which the permit was issued.

⁸³ Ibid, see section 40 (3) and (6).

⁸⁴ Ibid, see section 40(7).

⁸⁵ Ibid, see section 40(8).

⁸⁶ Ibid, see regulation 20(2) and the prescribed fees in the 9th schedule.

The consequence of invalidation of the work permit is to render the work permit invalid and the presence of the beneficiary of the work permit in Kenya unlawful unless otherwise authorized by the Act.⁸⁷

The Act also renders void work permit that has been obtained by or was issued in consequence of fraud, misrepresentation or the concealment or nondisclosure whether intentioned or in advertent, of any material fact or circumstance void and of no effect and subject to cancellation. The beneficiary of the work permit thereby becomes an illegal immigrant.⁸⁸

Other personnel from other government agencies often verify documents and assess applications. The final assessment requires a security check by the national intelligence service.

2.2.3 Eligibility for Work Permit

There are legal requirements that mandate employers to meet specific preconditions before filling for work permits on behalf of employees. The Act provides that eligible candidates must not be prohibited immigrants or inadmissible persons.⁸⁹ The Act sets out the persons who are deemed as prohibited immigrants and inadmissible persons.⁹⁰

The other eligibility considerations include proof of an extensive search for local personnel before hiring a foreign worker, stringent advertising and search requirements and demonstration of the infeasibility of training local people. Only after these conditions are met can local employers then submit a work permit application for a foreign worker.

2.2.4 Duties and Obligations for the Employers

The Act forbids employers from engaging foreign nationals on employment where:

⁸⁷ Ibid, see section 41.

⁸⁸ Ibid, see section 42.

⁸⁹ Ibid, see section 40(3).

⁹⁰ Ibid, see section 33.

- a) The foreign national is in Kenya illegally, this means that the foreign national does not hold a valid visa and valid work permit;
- b) The foreign national's status does not authorize him/her to take up the employment, this means that the foreign national does not hold the work permit in respect of the employment in question; and
- c) The terms and conditions of employment are inconsistent with the work permit.⁹¹

The Act places the obligation of applying for class D work permits on the employer. The employee is in the premises deemed to be familiar with all the eligibility issues referred to in section 33 and section 45 (1) of the Citizenship and Immigration Act 2012. The employer is required to keep records of foreign nationals in his/her /its employment for up to two years after termination of such employment. The employer is also required to file a report with the Foreign Nationals Management Service in the prescribed manner in respect of the foreign nationals under his/her/its employment or breach of the work permit conditions by the foreign nationals.

The Act renders criminal offense employment by any entity of illegal immigrants.⁹² The Act also sets out other general acts or conduct related to employment of foreign nationals that the law deems criminal⁹³and prescribes penalties for the offence.⁹⁴ The Act further sets out offences relating to documents. The application of the relevant legal provision extends to documents incidental to the issuance of work permits and the work permit itself.⁹⁵ The Act prescribes a fine of up to Kenya shillings five million (Kshs 5,000,000.00) or imprisonment for a term not exceeding 5 years or both.⁹⁶ The Act further empowers the immigration officials to impose

⁹¹ Ibid, see section 45(1).

⁹² Ibid, see section 45(5) and (6).

⁹³ Ibid, see section 53.

⁹⁴ Ibid, see section 53 (2) & (3).

⁹⁵ Ibid, see section 54.

⁹⁶ Ibid, see section 54 (2).

instant fines for breaches of the Act by way of overstaying in Kenya for periods less than ten days.⁹⁷

2.2.5 Powers Given to Immigration Officers

The Immigration officers are given wide-ranging powers with a new to giving effect to the Act. The powers range from the powers to conduct searches on any carrier or premise, interrogate, demand production of travel and identification or medical documents, arrest, restrain stop or deny departure of a foreign national against whom warrant of arrest has been issued by a court of Law and hand over the said individual to the nearest police station.⁹⁸

The Immigration officers are also empowered to arrest, search and detain persons suspected to have committed an offence under the Act subject to review of the reasons for the continued detention within twenty-four hours of arrest and detain. The rules of review further require that the suspect be placed before the judicial officer at least once during the seven days following the review and at least once during each thirty-day period following each previous review.⁹⁹

The Immigration officers also have power in giving effect to the Act, to summon any person other than Kenyan citizens to provide and furnish such information and produce such documents and other particulars necessary to enable the Immigration officer determine whether or not the foreign national is entitled to be in Kenya.¹⁰⁰ Similarly the Immigration officers are also given powers to summon any Kenyan citizen to determine whether the said citizen has violated any

⁹⁷ Ibid, see section 55.

⁹⁸ Ibid, see section 48.

⁹⁹ Ibid, see section 49(4).

¹⁰⁰ Ibid, see section 49(8).

provisions of the Act or provide information, documents and any other particulars required to determine whether the Act has been violated.¹⁰¹

The Act also clothes the Immigration officers with powers to institute Immigration offences proceedings and where the proceedings are instituted in the subordinate courts, conduct the prosecution. The Immigration officers are also empowered where offenders enter written admissions of contraventions to levy instant fines.¹⁰²

2.2.6 Review and Appeals

The Act provides two avenues that can be taken by persons aggrieved by the decisions of the permit determination committee, the director of Immigration or any other immigration officer.¹⁰³

2.2.7 Cost of Work Permit Processing

These costs relate to the costs of administering and operating work permit schemes. This essentially entails both a private and public component. These costs can be divided into four categories namely:

- i. Application costs;
- ii. Processing costs;
- iii. Possible delay costs; and
- iv. Add-on costs.

2.2.7.1 Application Costs

Work Permit application fees are national. Application fees for Class D work permits differ by length of stay and even processing time. In Kenya the application fee is a non-refundable sum of Kenya Shillings Ten Thousand. Other costs of application are the private costs of assembling the

¹⁰¹ Ibid, see section 49(9).

¹⁰² Ibid, see section 55.

¹⁰³ Ibid, see section 40 (10) and section 57.

information, documents, legal services and other incidental costs, incidental to the application such as trading experiences and subsistence.

2.2.7.2 Processing Costs

Upon the approval of the work permit application and depending on the length of the work permit the procedure is that the successful applicants are required to make payments of Kshs.200, 000.00 being issuance/processing fees. The successful applicants are also required to deposit security or security bond in the form of a bank guarantee equivalent to Kshs. 100,000.00 as prescribed by the KC & IA.¹⁰⁴

2.2.7.3 Possible Delay Costs

The Law contemplates expeditions processing times for work permit. The Act does not specify the period of time within which the permit Determination Committee is to sit and make recommendations. However, the Director is required to issue work permit within fourteen (14) days of receipt of the recommendation¹⁰⁵

The Director can also where in his opinion the issue of permits to an applicant is not in the interest of the country or for any other sufficient reason either refer the matter back to the committee for further consideration or decline to issue the permit to the applicant.¹⁰⁶ KC & IA does not specify the period of time within which the Director is required to either refer the matter back to the committee or decline to issue the permit. However, the interpretation of the Provision of section 40 (6) as read together with provision of section 40(7) suggests that the decision should be made within fourteen (14) days.

¹⁰⁴ Ibid, see the 9th schedule.

¹⁰⁵ Ibid, see section 40 (6).

¹⁰⁶ Ibid, see section 40 (7).

International trade and business activities through right time scales and delays in processing the work permit applications lead to losses in business opportunities.

2.2.7.4 Add-on- Costs

The add-on costs results from the rejection and reference of work permit applications. The actual cost of successful work permit applications therefore includes other add-on costs. These include payments for fresh applications and the attendant costs of re-submitting the work permit. Airlines also incur extra costs.

2.3 Conclusion

Based on the foregoing, while it is clear that Kenya's has an existing work permit regime, the same is rooted in colonial underpinnings and is not well suited for the management of the work permit needs of today. Furthermore, over the years, very little attention has been dedicated to address and update the legal framework of the work permit regime.

CHAPTER THREE: AN ANALYSIS OF CHALLENGES AND GAPS FACING WORK PERMIT REGIME IN KENYA

3.1 Introduction

This chapter presents an analysis of the challenges that arise from the work permit regime in Kenya, ostensibly because of the gaps in the law that have been identified in the foregoing chapter. It also highlights the challenges to the work permit regime in Kenya based on the study's findings. It ties its analysis of existing primary and secondary literature with primary data collected from the field.

3.2 Research Findings

Kenya has a positive investment climate that has made it attractive to international firms seeking a location for their regional or African operations. The investment climate is characterized by stable monetary and fiscal conditions and a legal environment that makes few distinctions between foreign and domestic investments.¹⁰⁷ Kenya has a strong telecommunications infrastructure, a robust financial sector, and solid aviation connections both within Africa and to Europe and Asia. Its port at Mombasa is the major trade gateway for much of East Africa.¹⁰⁸ Increasing integration among the members of the East African Community as well as Kenya's membership in other regional trade blocks provide growing access to a large regional market outside of Kenya.

¹⁰⁷United States Department of States, 'Diplomacy in Action' (United States Department of State 2014). Available at <https://www.state.gov/documents/organization/229096.pdf> .

¹⁰⁸ United States, 'Kenya Country Commercial Guide' (United States 2015). Available at, <https://www.export.gov/apex/article2?id=Kenya-Executive-Summary> .

Key challenges for investors are Kenya's consistently low rankings on international measures of the ease of doing business and corruption.¹⁰⁹ This is enhanced by restrictive immigrations laws that make it difficult for expatriates and other categories of people and companies seeking to work and do business in Kenya to gain access.¹¹⁰ Inconsistent administration of work permit applications makes it somewhat difficult to employ expatriates in Kenya. There have been several cases of denial of work permits or undue delays in the processing of work permits. These have negative implications on doing business in Kenya. It is an indication that the legislative reforms which ought to facilitate work permit acquisition by foreign workers in the country have not been matched by changes in the practice on issuing of work permits.¹¹¹

Implementation of the key objective of transferring technology and skills to the local workforce continues to be unmet. The issuance of work permits to foreigners is primarily based on covering shortfall of local skills. The KCI Act requires continuous monitoring of foreign workers with a view of ensuring transfer of skill and technology to the local workforce. This requirement was analysed on the basis of the work permit issuance process, and questions on whether the transfer of technology and skill was actually achieved was answered.

From the foregoing, the gaps and challenges facing work permit regimes as found out through this study can be broadly classified into: the restrictive issuance of work permits in Kenya, which is a major contributor to questions related to the validity and the process of acquisition of work

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Victor Ogalo, 'Achievements and challenges of implementation of the East African Countries: Case for Free Movement of Labour' (2012) <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/Papers/CMP%20Implementation%20in%20Kenya.pdf> .

permits; the complex legal and institutional framework relating to work permits, which in itself occasions numerous opportunities for mismanagement, maladministration and corruption; and the lengthy procedures in the obtaining of work permits, ostensibly discouraging eligible foreigners from applying for work permits by following formal processes of acquiring the work permits as established by the work permit law in Kenya. Interviews on the processing and working of work permit regime was conducted on officials responsible for the working of work permits from the Ministry of Immigration, Ministry of Labour, Ministry of Education, and KenInvest Corporation.

3.3.1 Restrictive Issuance of Work Permits to Foreigners

The government of Kenya issues work permits to foreign expatriates only where it is demonstrated that there are no Kenyans with the required skills to take up such jobs.¹¹² Through this practice there is enhanced corruption on the part of foreign firms as majority of the expatriates would want to use illegitimate means just procure a work permit.

The study established that expatriates encounter an extremely lengthy procedure for the acquisition of a work permit in the Republic of Kenya. This therefore makes it really challenging for the expatriates seeking to gain access to Kenya. The expatriates contend that the limited categories of work permit regime further worsen the situation. This has for example, led to expatriates working in the charity sector conducting their affairs without valid work permits in total contravention of the Kenya Citizenship and Immigration Act 2012.¹¹³

Eligibility criterion is designed to ensure that the foreign labour that enters into Kenya is seized of such skill that is both new and useful to the Kenyan economy. The employer is therefore

¹¹²Editors, 'Kenya: Foreigners Risk Losing Jobs as Govt Enforces Tough Work Permit Law' (2015). Available at <http://allafrica.com/stories/201606220416.html>.

¹¹³ Ibid.

required to demonstrate that every effort has been put in place to recruit locally qualified personnel in the relevant area in vain. The employer is also required to show why it is necessary to fill that position and that by taking a foreign national there will be a direct benefit to Kenya.¹¹⁴

There are however concerns that these eligibility conditions are not effective in ensuring that the only deserving cases qualify for work permits. This inability to protect the local labour has been blamed on a number of issues key among them being the vague rules that give the relevant authorities wide discretionary powers without clearly laid down set considerations.¹¹⁵ Closely associated with this is the element of corruption that capitalizes in the discretionary powers given to the immigration authorities. The other problem associated with the protection of the local labour market is the issue of illegal immigrants obtaining gainful employment. The presence of illegal immigrants successfully gaining employment in Kenya is indicative of the inability of the immigration laws to adequately protect the local labour market.

3.3.2 The Legal and Institutional Framework and the Challenges Associated to the Issuance of Work Permits

This section presents an analysis of the constitutional provisions and provisions in various Acts of Parliament addressing the matter. The Citizenship and Immigration Act of 2011¹¹⁶, Kenya and Citizens and Foreign Nationals Management Service Act¹¹⁷ are the main statutes that address the issue of work permits on labour mobility in and out of the country. This aid in the regulating of expatriates seeking employment in Kenya. Therefore, their effective implementation matters a lot.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Act No. 12 of 2011, assented to on 30th September, 2011 and Commenced 4th October, 2011.

¹¹⁷ Ibid.

Article 18 of the Constitution, provides that Parliament shall enact legislation governing entry into and residence in Kenya. This Article specifically recognizes entry and residence into Kenya without necessarily acquiring citizenship, meaning that it especially, addresses immigrants. Article 39(2) (3), over and above guaranteeing freedom of movement, provides that every person has the right to leave Kenya. It is therefore important to note that all these provisions are not absolute in terms of applicability hence the need of the Citizenship and Immigration Act to guard and protect the entry of expatriates to the Country without proper documentation.

With regard to immigrants, the Act provides that a person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass.¹¹⁸ Further, the Act makes it an offence for any person not being a citizen of Kenya, to engage in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by a work permit. The only exception is if one is exempted from acquiring a work permit under the regulations. That then makes it mandatory for foreigners to acquire work permits. The issuance of the work permits is to be done pursuant to section 40 of the Act.

3.3.3 Lengthy and Discouraging Procedure in the Issuance of the Work Permits to Foreigners

The Government of Kenya has designed mechanisms and ways in the issuance of work permits to restrict foreigners' access to their labour markets. This is achieved through elaborate application procedures, thorough vetting processes, high application and issuance costs and refusals to issue the permits if there are locally qualified persons.

¹¹⁸ Section 34.

Further, elaborate application and issuance procedures, taking up to three months to process a new work permit. Second, Kenya charges Kshs. 10,000 processing fees and Kshs. 200,000 per year as issuance fees¹¹⁹. The fee is on the higher scale and makes employment of citizens of other Partner States and even foreigners from non-partners states an expensive affair. There is a condition in its application forms of work permits that employers must prove that no domestic workers could be found, and that appropriate steps have been taken to train domestic workers for the position.¹²⁰ This provision applies to all foreigners working in Kenya.

The Act provides that it is the duty of the employer to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him or her employment.¹²¹ This implies that the work permits should be processed even before offers of employment. However, the application forms in the Regulations require attachment of the employment contract setting out the terms of employment.

This, coupled with the long periods, almost three months, it takes to process the work permits, causes confusion as to the timelines within which the employers should apply for the same. It is not clear whether it is before signing of the contract, or within how many days after the signing of the contract.¹²² Therefore, the Kenyan policy framework is inferred from numerous scattered policy documents. It is generally restrictive to free movement of labour. This has to change so

¹¹⁹ Kenya Citizenship and Immigration Regulations 2012, Ninth Schedule on Fees.

¹²⁰ Ibid, First Schedule Form 25: Application for Issuance or Renewal of Permit, explanatory

¹²¹ Kenya Citizenship and Immigration Act, section 45(2).

¹²² Pointed out by IM4, Deputy Head, Permits Section, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

that Kenyans can benefit from other expatriates with skills in areas where the country is not well versed.

Complexities in issuing work permits have had direct negative impact on the attainment of the aforesaid work permit objectives. They had the effect of inhibiting the efficiency of the immigration laws, for instance, corruption and abuse of power thrives within the immigration department when the law, rules and regulations on work permit regime are couched in vague discretionary terms without clear guidelines on the criterion to be used in evaluating the work permit applications. This inadequacy makes the laws uncertain and unpredictable. This uncertainty and unpredictability of the rules and regulations create an environment that is not attractive to foreign investors and foreigners seeking employment in Kenya. The environment is also conducive for corruption, which also serves to make Kenya unattractive destination for foreign investors and foreign employment. The process of applying and obtaining work permit is also expensive and prohibitors to foreign investors and foreign employment.

The other problem that requires attention in considering the efficacy of the work permit regimes is the emerging issue of terrorism. This is a global problem but has at its root immigration implications. There have been reports in the media that some of the terror suspects hold or have previously held valid Kenyan visas and work permits. There are allegations that whereas the grant of visas and work permits to persons who pose risks to national security is so much a problem with the gathering and dissemination of intelligence by the intelligence agencies, the legal frame work that is accused of being vague and weak is also to blame. There are also allegations of corruption in the issuance of work permits and visas to individuals against clear security advice by the security agencies. This if true, places the immigration laws under scrutiny.

3.4 Analysis of the Interviews carried out in the Immigration department and other Related Departments

Interviews were key in this research just to give a clear picture on how this is done in the ministry. The purpose of the research interview is to explore the views, experiences, beliefs and/or motivations of individuals on specific matters such as policy makers in matters related to immigration in Kenya particularly for expatriates seeking employment. It involved interviews with expert on effects of migration on the Department of Immigration in Kenya. Information from the Department of Immigration was complemented with interviewee data obtained from the Ministry of Labour to establish the qualifications of the foreign persons who were awarded work permits and whether the skills of those foreigners awarded work permits in Kenya was transferred to Kenyan locals at the expiry of the work permits and whether such skill was even lacking in the first place. The Ministry of Education complemented the interview in view to establish whether effective controls for the transfer of technology had been put in place upon the expiry of work permits. Further interviews were carried upon officials of KenInvest, a state corporation charged with encouraging and facilitating work permits for foreigners with a view of spurring foreign direct investment into Kenya, to inquire on the criteria of persons that KenInvest Corporation was using to encourage and facilitate work permit applicants into Kenya. There were seven main questions in the questionnaires. Parts of the questionnaire interviews conducted is outlined hereunder:

Interviewee 1 at the Department of Immigration with an official on effectiveness of the Work Permit Regime of the Kenya Citizenship & Immigration Act

Age: _____

Nationality: Kenyan

Gender: Male

Marital status: _____

Occupation: _____

1. What measures does the department have in place to ensure that expatriate knowledge is transferred to the local workforce?

Feedback: Applying a class D permit (Permit offered to persons seeking specific employment) requires the company to provide a qualified understudy to take over the position after training.

2. How does the department ensure compliance with the above?

Feedback: when receiving the permit we check whether the understudy furnished earlier is the same. If not the company should explain what happened with previous understudy and why the position has not been transferred to a Kenyan. Further employees are required to submit returns of an employment of expatriates and their understudies by completing form 27.

3. In your opinion, are the measures sufficient and effective?

Feedback: Yes. Field visits to the company are conducted to ensure compliance and report done and forwarded to permit Determination Committee for necessary action. However, in the same sectors, employers find it profitable to employ non-Kenyans as opposed to Kenyan like Tour and Travel Companies will employ foreign Tour & Travel consultants which they find essential for its continued flow of business.

Similarly, it remains a challenge to handle thousands of semi-skilled foreign workers employed in Key infrastructure projects such as roads and houses sponsored by the Government of Kenya.

4. Does the department have a mechanism for evaluating expatriate performance periodically or at the end of the permitted period?

Feedback: Companies are supposed to furnish the Department with a list of all expatriates employed in the company. Comparison is made of ratios between Kenyans and expatriates employed in the company. Requirements under section 45(3)(b) for employer to complete form 27 in respect of foreign employees under his employment. The section makes it an offense to fail to submit employment returns to the Department.

5. If yes to the above, are these measures sufficient and effective?

Feedback: Not easy to know whether the skills were transferred to a Kenyan understudy since some employers will indicate that the Kenyan trained left for greener pastures.

6. What informs the department's decision as to whether or not to renew work permits?

Feedback: *If skills are locally available, job vacancy left to be filled by a Kenyan.*

7. Are there possible legislative changes needed to ensure compliance of sections 40 & 41 of the Act? Any possible recommendations?

Feedback: *Introduction of a rule that shuts door for foreigners seeking permits for jobs that pay less than a certain amount in salary which will reduce engagement of foreigners in lower cadres. Introduction a provision that work permit shall not be renewed after certain no of renewals in particular cases.*

The findings of the study for the different entities participating in the issuance of work permits offered a glimpse of the gaps and challenges faced in the implementation of the work permit regime. The questions were tailor made to try understand how the process and decision making involved in awarding of work permits is undertaken, with a key objective of identifying practical challenges. Interviews from the Immigration Department was complemented by those from the Ministry of Labour, Ministry of Education, and KenInvest Authority. The labour ministry is expected to offer up to date labour situation in the country, with focus being on the labour needs and shortfalls. The Education Ministry offers the country's education situation by giving statistics of the skills already available in Kenya. The KenInvest Authority participates as a propagator of foreign investment. It is expected to advocate for favourable work permits regime for foreign investors with the intention of spurring foreign direct investment in the country.

The study findings from the above participants noted the respective challenges in the issuance of work permits. The key consideration for issuing the work permits under the work permit regime is only where there is a local skill shortfall. Therefore, the work permit issuance processes will only be above reproach if there is real time data on the country's labour and skill needs. The data on labour and skill requirement should be available to officers working in the issuance of work

permits. The work permit issuing panel in renewing work permits, is to similarly consider whether the foreign holder has indeed transferred skill and knowledge to the local work force. The key challenge however identified in this process, is the inadequacy of compliance and monitoring mechanisms of whether there is local labour and skill to match market demand, and whether the foreign labour and skill has actually been transferred to the locals upon the expiry of the work permit duration.

The Immigration Department lacks a proper mechanism of monitoring whether transfer of skill, knowledge and technology is actually undertaken by the foreign expatriates. The department contents unavailability of a clear skills inventory that would aid the issuance of permits based on labour needs. They only rely on answered questionnaires from intending and existing applicants seeking new or renewal of work permits. Unavailability of field personnel makes it technically impractical to conduct field visits.

The Immigration Department notes complexity in dealing with multi-nationals, a key employer of lower cadre foreign workers. The said companies contribute significantly to the economy through investments hence necessitating lessening of work permit regulations. The same bedevils UN agencies, foreign embassies and foreign government related agencies. Foreign government sponsored infrastructural programmes translate to influx of lower cadre foreign expatriates. The department is unable to strictly enforce work permit requirements due to the favourable government-government agreements insulating such projects.

The labour ministry similarly lacks personnel to conduct labour audit exercises, meant to identify the actual labour needs of the country. Most glaringly, the Ministry last conducted a countrywide audit exercise in 2011. Lack of budgetary allocation for the exercise over the last four years has forced them to rely on past statistics that are obviously outdated. KenInvest Authority purely lobbies for foreign investors hence advocates for more efficient work permit issuance process.

From the above interview findings, Kenya still has a long way to go when it comes to the handling of expatriates and the issue of works permits. It is also clear from the interview that there are no clear regulatory mechanisms to ensure compliance to the Immigration laws. Despite provisions clearly set out in the KCI Act, enforcement remains a key challenge due to the problems of personnel and inadequacy of funding. Key policy and legal amendments may perhaps streamline the work permit regime in Kenya

3.5 Conclusion

This chapter reviewed the work permit regime in Kenya in light of its practical application. The gaps of law and challenges identified have been outlined to include: restrictive practices in the issuance of work permits to foreigners; challenges arising out of the complexity of legal and institutional framework in implementation of the work permit regime, which complexity becomes fodder for corruption and maladministration; and lengthy procedures involved in the issuance of permits which discourage foreigners from applying for work permits using the formal processes while encouraging corrupt behaviour among officials charged with the responsibility of issuing work permits. Interviews from government officials charged with the respective responsibilities of ensuring that the work permit regime works effectively and efficiently from the Ministry of Immigration, Ministry of Labour, Ministry of Education, and

KenInvest was obtained in order to identify the specific challenges that bedevils work permit regime in Kenya. Notably, the labour ministry lacked a mechanism of establishing whether transfer of technology and skill had actually occurred at the end of the work permit process, among others. The education ministry lacked resources to establish the extent, quality and quantity of transfer of skill and to adequately respond to the market and industry concerns as established by the Kenyan situation. Meanwhile, KenInvest lacked the data necessary for its use in knowing their potential targets for work permit based on the local human resource and financial capital requirements.

CHAPTER FOUR: COMPARATIVE ANALYSIS OF THE WORK PERMIT REGIME OF THE UNITED KINGDOM, SOUTH AFRICA AND KENYA

4.1 Introduction

This chapter discusses the work permit regime in the United Kingdom and South Africa and with a view of highlighting the salient differences between the laws and the practices of work permits in the United Kingdom and South Africa and those of Kenya in order to identify lessons and best practices as a way of benchmarking the Kenyan law.

South Africa was selected as a benchmark for comparative analysis because it has one of the best immigration systems in Africa.¹²³ United Kingdom was selected because Kenyan laws have greatly borrowed from the footprints of its former colonial master. In addition, immigration laws in the United Kingdom are equally advanced, and are among the best in the world.¹²⁴

This comparative analysis from the United Kingdom and South Africa is important in order to help Kenya respond the gaps and challenges facing its work permit regime as identified in the previous chapter. These challenges and gaps identified and in need of corrective action included: restrictive practices in the issuance of work permits to foreigners; challenges arising out of the complexity of legal and institutional framework in implementation of the work permit regime; and lengthy procedures involved in the issuance of permits which discourage foreigners from applying for work permits using the formal processes while encouraging corrupt behaviour among officials charged with the responsibility of issuing work permits. Interviews from government officials charged with the respective responsibilities of ensuring that the work permit regime revealed: a lack of mechanism in establishing whether transfer of technology and skill had actually occurred at the end of the work permit process; a lacking in resources to establish

¹²³ Greg P and Wadsworth J, *The Labour Market in Winter: the State of Working Britain* (Oxford University Press 2011) 84.

¹²⁴ Ibid.

the extent, quality and quantity of transfer of skill and to adequately respond to the market and industry concerns; and a lack of data necessary for identifying potential targets of work permits based on the local human resource and financial capital requirements.

4.2 South Africa

South Africa has experienced immigration for many years.¹²⁵ Many black people from Central Africa, together with the Dutch, Germans and French settled in the country in the 17th and 18th centuries.¹²⁶ Since this period, South Africa has and continues to experience a huge number of immigrants with the sole aim of seeking employment.

4.2.1 South Africa Immigration Laws

The immigration laws in South Africa have undergone significant changes in aim to attract qualified and competent employees who in turn attract investors. This led to changes of South Africa Immigration laws in a way that they were able to accommodate expatriates. The initial motivation behind the changes to South Africa's immigration rules was believed to be economic – to attract more people with desirable skill sets and help make South Africa's economy more investor-friendly and competitive.¹²⁷

South Africa has now new laws and regulations governing entry to South Africa. It is said new laws and regulations are complicated and confusing. In order to further regulate the influx of immigrants seeking employment and in order to protect the natives of South Africa the

¹²⁵ Audie Klotz, "South Africa as an Immigration State" (Politikon 2012).

¹²⁶ Fatima Rasool, "The effectiveness of South Africa's Immigration Policy for Addressing skills shortages" (2009). Available at http://www.fm-kp.si/zalozba/ISSN/1581-6311/10_399-418.pdf.

¹²⁷ Moeketsi Seboko, 'inbound expatriate employees coming to work in South Africa? What you need to know before they go' <https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Tax-and-Legal-Publications/Documents/tea-september2014-south-africa-immigration.pdf> .

Government introduced the work permit quota. Therefore, Immigration in South Africa is regulated by the Immigration Act, 2002, and the regulations to that Act. There are limited employment opportunities in South Africa, particularly for the country's vast reserve of unskilled and semi-skilled workers.¹²⁸ Accordingly, work permits will normally not be issued to people who follow an occupation for which there are already sufficient people available to meet South Africa's needs – particularly unskilled and semi-skilled workers

The new laws and regulations governing those entering the country have not changed the entire South Africa immigration landscape, however in their execution by the Department of Home Affairs, they have caused confusion and sometimes havoc for both private person and the business sector alike.¹²⁹ The Republic of South Africa needs to consider the said changes and their significant.

4.2.2 Work permits and related legal regime in South Africa

Employers wishing to bring workers into the country from overseas will have to satisfy the Department of Home Affairs that they are cannot find the required staff locally. However, a key element of the government's economic growth plan is to recruit foreigners with scarce, critical and special skills in certain key areas. A pre- determined number of so-called "quota work permits" are made available for these positions. The list of occupational categories is updated by the Department of Home Affairs every year.

¹²⁸ Working in South Africa: work permits. Available at, <http://www.southafrica.info/travel/documents/workpermits.htm#.WCLfovTtC1s>

¹²⁹ All the new South African immigration laws and changes; <<https://www.immigrationouthafrica.org/blog/all-the-new-south-african-immigration-laws-and-changes/>>

The Republic of South Africa is governed by the Immigration Act of 2002. This is the principle legal law on immigration. The Immigration Act, 13 of 2002 was amended by the Immigration Amendment Act, 13 of 2011.¹³⁰ Finally, three years later, the Amendment Act (with its regulations) was promulgated on 22 May 2014, being published in the Government Gazette.¹³¹ The revised Immigration Regulations (the “Regulations”) also came into effect on 26 May 2014. These amendments were promulgated to accommodate new changes in the South Africa. Work permit is therefore covered by section 16 of the Immigration Act No.13 of 2002 of the Republic of South Africa.

The section states that work permit (1) an applicant for a quota work permit, general work permit, exceptional skills permit and intra-company transfer work permit shall submit:¹³²

- a) at the discretion of the Director-General, proof of a valid return air ticket, a deposit or a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependent family members, should it become necessary, respectively: Provided that in the case of a deposit, such deposit shall be refunded to the depositor after the final departure of the applicant or after a permit contemplated in section 25 of the Act has been issued to the applicant: Provided further that the payment of the deposit may be effected by means of a bank guaranteed cheque or credit card at places where such facility exists;
- b) a yellow fever vaccination certificate if he or she travelled or intends travelling from or through a yellow fever endemic area: Provided that the certificate shall not be

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

- required where that person travelled or intends travelling in direct transit through such area or where an application is made in the Republic;
- c) a police clearance certificate
 - d) medical and radiological reports in respect of each applicant: Provided a radiological report shall not be required in respect of children under the age of 12 years or pregnant women;
 - e) the documentation relating to minor dependent children accompanying the applicant to or joining the applicant in the Republic contemplated in regulation 9(3)(c);and
 - f) the documents relating to his or her marital status or spousal relationship contemplated in regulation 9(3)(a) and (b).

4.2.3 Validity Period for Work Permits in South Africa

Work permits are a form of temporary residence permit, issued on request to applicants who intend to visit South Africa for longer than three months but less than three years.¹³³ Once issued with a quota work permit, you are required to submit proof that you have secured employment in the approved occupational category within 90 days, and then every year after that. The quota work permit is "open ended", that is, it is valid for as long as you stay employed in the original approved category or profession. A general work permit is valid for the duration of the contract.¹³⁴ This therefore allows the Government to determine as and when to renew the said permit. The regulations governing work permit in South Africa will further demonstrate how effective the administration is.¹³⁵

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

4.4.4 Lessons from the South African Work Permit Regime

There are many types of work permits in South Africa, being issued under the Immigration Act (No. 13 of 2011) to satisfy different requirements. For instance, there is the quota permits, general work permit, and intra-company permits which can be issued for durations that range from three (3) months to three (3) years.¹³⁶ This is unlike the Kenyan situation where work permits are generally classified into permits to employees and permits to the owners of capital and investors. A further classification of work permits in Kenya, as is the case in South Africa, will go a long way in ensuring that diverse needs of different workers is met.

Work permits in Kenya generally have a fixed timeline of one (1) year. A person seeking a work permit will therefore have to apply for an annual permit, and renew it yearly, notwithstanding the fact that the person may want to stay for periods exceeding one year, or less than that. Borrowing from the South African analysis, Kenya can create time periods, and start issuing permits based on the expected duration that a worker is expected to stay in the country.

In South Africa, upon arrival at the ports of entry, workers are immediately assigned three (3) months' work permits, and are to use these temporary permits until they get full permits, or until they leave the country, whichever is earlier. This allows foreigners to engage in productive economic activity upon arrival at the port of entry. This approach can be adopted in Kenya through legislative or regulatory amendment of the Kenyan immigration law on work permits in order to prevent situations where foreign workers, having arrived in the country, and are residing

¹³⁶ Republic of South Africa, 'Immigration Act' (No 13 of 2011) (South Africa 2011).

legally, are unable to engage in economic activities, to their detriment and to the loss of the government in terms of unearned taxes.

4.3 United Kingdom

It is worth noting that immigration of highly skilled persons from developing to developed countries has increased over the past decades.¹³⁷ This is due to the aging population of the developed countries. Due to this increased influx of immigrants seeking jobs in developed countries, developed countries like the United Kingdom have come up with laws and policies regulating entry into their countries.¹³⁸ This analysis will be considered under this section.

4.3.1 Laws and policies regulating entry of expatriates to the United Kingdom and how they differ from those in the Republic of Kenya

In both developed and developing countries a range of policies are pursued in response to the emigration of highly skilled workers. The employment of foreign workers often implies different legislation than for national employees.¹³⁹ Expatriates seeking employment in the united are supposed to get a work permit through formal registration. In addition, any national from non-European Union member state seeking entry or permission to remain in the United Kingdom for the purpose of employment will normally require a work permit.

¹³⁷ Paul Greg and Jonathan Wadsworth, *The Labour Market in Winter: the State of Working Britain* (Oxford University Press 2011) 84.

¹³⁸ Ibid.

¹³⁹ Enterprise Europe Network, *Work Permit Regimes in Europe* (London 2010). Available at <http://www.londonchamber.co.uk/docimages/7035.pdf>.

The Worker Registration Scheme is designed as a streamlined registration system, which does not impose additional or unnecessary burdens on potential employers of a national from the Countries that joined the EU in 2004. Applications for registration are the responsibility of the individual, but employers should however ensure that the individual is provided with a letter on comp any paper confirming the date on which the individual began working.¹⁴⁰

The individual will need this when applying for registration. An employer is responsible under the regulations for ensuring that they are authorized to employ a worker from a new Member State. The employer is automatically authorized to employ the worker for one month. If the worker has applied for a registration certificate during that one-month period, the employer will be authorized to prolong the employment until the application has been approved or rejected.

4.3.2 How a Work Permit is attained in the United Kingdom

The main mechanism for managing labour immigration to the UK is the work permits system. In recent years this has expanded considerably with several new schemes introduced. Restrictions on foreigners seeking work in the UK were first introduced during the First World War.¹⁴¹ In 1919-20 a system of work permits was brought in which laid down conditions to regulate the employment of non-Commonwealth foreigners. Not until the Commonwealth Immigrants Act of 1962 was labour immigration from the Commonwealth.¹⁴²

The work permits system currently in operation is more comprehensive than it has ever been.

¹⁴⁰ Ibid.

¹⁴¹ James Clarke, "Work permits and foreign labour in the UK: A Statistical Review" (London 2010). <https://www.google.com/search?q=Laws+regulating+work+permits+in+the+united+Kingdom+pdf&ie=utf-8&oe=utf-8&client=firefox-ab>

¹⁴² Ibid.

There are now four main elements in the work permits system:¹⁴³

- I. the main scheme (which includes work permits, first permissions and the Training and Work Experience Scheme (TWES));
- II. the Seasonal Agricultural Workers Scheme (SAWS);
- III. the Sectors Based Scheme (SBS); and
- IV. the Highly Skilled Migrant Programme (HSMP).

These are the four possible permits granted to the immigrants seeking employment in the United Kingdom. They are for specific classes of expatriates and for a specific duration. Under the 1971 Immigration Act, a work permit is granted to a specific employer for a named person for a specific job through the main scheme.¹⁴⁴ This is the main Act that regulates work permits in the United Kingdom.

There are three main sources of UK employment law: the common law, statute and European law.¹⁴⁵ Under the common law, all employees in the UK work under a contract of employment with their employer. The common law (particularly the law of contract) forms the legal basis of the employer/employee relationship.¹⁴⁶ Statute law governing employment relationships in the UK have grown to become a major phenomenon in the recent decades. Since the early 1970s there has been a dramatic growth in the amount of UK employment protection legislation which has supplemented the common law rules. The main employment law statutes are: Equal Pay Act 1970; Health & Safety at Work etc Act 1974; Sex Discrimination Act 1975 and others that are all aimed at regulating expatriates and the citizens of the United Kingdom. The European Union law

¹⁴³ Ibid.

¹⁴⁴ United Kingdom, Immigration Act (1971). Available at http://www.legislation.gov.uk/ukpga/1971/77/pdfs/ukpga_19710077_en.pdf

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

has also provided an important rejoinder of the UK employment law. If UK domestic law has failed properly to implement EC Treaty obligations, individuals may rely on the EC Treaty in the UK courts. EC legislation has been particularly important in the areas of equal pay, discrimination and employees' rights on business transfers. This is particularly the most important legislation as it applies when all the above have failed to address the issue in dispute.

4.3.3 Work Permit Requirements

As earlier stated above, any non-citizen of the United Kingdom entering the jurisdiction of the United Kingdom with the intention of engaging in economic activities is obliged to have a work permit.

4.3.3.1 Eligibility to Apply for a Work Permit

Work permit applications may only be made by employers based in the UK who need to employ a person in England, Scotland or Wales.¹⁴⁷ Overseas companies cannot make applications, nor can individuals apply on their own behalf. The application should be made for a named person to do a specific job, normally on a full-time basis. Permits are only issued for certain categories of skilled work, and are not issued for jobs at manual, craft, clerical, secretarial or similar levels. Work permits are not transferable between employers unless permission is firstly sought from Work Permits (UK).

In the United Kingdom there are four types of work permit are they include:

- i) Tier 2 General-Skilled worker;
- ii) Tier 2 Intra-Company Transfer;

¹⁴⁷ United Kingdom, Labour Law (2018). Available at. <http://www.tim-russell.co.uk/upimages/employment%20guide.pdf>

- iii) Tier 2 Sportsperson Visa; and
- iv) Tier 2 Minister of Religion.

All the four major types of work permits have different functions and governed differently. This is the first category of the work permits is for the skilled workers in the United Kingdom. Therefore, if you are seeking to immigrate to the UK on a Tier 2 General visa you will need to achieve a minimum score of 70 points from the following five areas of assessment.¹⁴⁸

One is normally grade in terms of points before being granted the work permit sought. The points are normally 30. 30 points - Assigned a certificate of sponsorship and met one of the following requirements: Shortage occupation role; or Employer completed a Resident Labour Market Test; or Switching from the Tier 1 Post Study Work category; and continuing to work in the same job for the same sponsoring employer (work permit extension).

Further there are also points on the expected salary that one wants or desires to be paid. The points are 20.¹⁴⁹ To submit a successful Tier 2 General application you must achieve a score of 10 points for your English language skills. This is to ensure smooth integration of the employee to the system.

¹⁴⁸ Work permit for skilled persons in the United Kingdom. Available at. <http://www.visalogs.net/uk/tier-2-visa-general-skilled-worker/4/133>

¹⁴⁹ Ibid.

4.3.4 Duration of Stay

A work permit can be issued for any period of time between 1 month to 60 months in the United Kingdom.¹⁵⁰ The duration of the work permit is dependent on the length of time requested by the sponsoring company and is also at the discretion of the Home Office. A permit holder will be "locked-in" to their employer for the duration of the visa.¹⁵¹ Moving to another employer requires another application to be made.

This is another critical aspect considered in the United Kingdom. If you are granted permission to stay in the UK as a Tier 2 General skilled worker, you will be able to live and work in the UK for a maximum time of three years, or the time given in your certificate of sponsorship, whichever time is shorter. At the end of this period if you want to stay you will need to apply to extend your stay as a skilled worker for a further 2 years.¹⁵² This enables the government to monitor and review once stay in the United Kingdom after the expiry of period allowed working in the United Kingdom.

¹⁵⁰ Indefinite leave to remain: calculating continuous period in UK. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518855/ILR-continuous-periods-v13.pdf.

¹⁵¹ Ibid (n 17).

¹⁵² Home office: Tier 2 of the points-based system. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515549/Tier-2-of-the-points-based-system-v24_0.pdf

4.3.5 Work Permit for Companies Wishing to Do Business in the United Kingdom

This category of permits is normally referred as A Tier 2 Intra Company Transfer Visa (ICT) allows a candidate to transfer to the UK from an overseas branch of a UK company in order to undertake work on a specific project.¹⁵³

The Intra Company Transfer category places strong emphasis on the employer being able to demonstrate that the salary for the role is appropriate and that no UK resident worker can fill the position.¹⁵⁴ The Companies seeking permits are divided into two. They are in two division, Short term and long-term company. Must be paid over £24k; and no more than 40% of the salary package may be comprised of accommodation allowances.¹⁵⁵ While a long-term company Must be paid over £40k and no more than 30% of the salary package may be comprised of accommodation allowance.

In conclusion, it is easy for the work permit regime in the United Kingdom to achieve its intended purpose because of the mechanisms placed to monitor the same. They are divided in categories making it easy to monitor and tape the best skills ever. They have a special category called skilled workers permit. They are able to put this in their data base and make it mandatory for them to train natives of the United Kingdom and leave the skills there. They are also there for a specified period which is renewed upon compliance to the set down regulations. Kenya needs to emulate this and ensure that they have special categories of permits in order to achieve the desired goals.

¹⁵³ Tier 2 Visa Intra-Company Transfer. Available at, <http://www.visalogs.net/uk/tier-2-visa-intra-company-transfer/4/134>

¹⁵⁴ Jutta Kawalerowicz: Attracting highly qualified and qualified third country nationals UK National Contribution http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/28.united_kingdom_attracting_high_qualified_tcn_study_en_version_final.pdf.

¹⁵⁵ Ibid.

4.3.6 Lessons from the United Kingdom Work Permit Regime

There are many different types of work permits being issued in the United Kingdom as compared to Kenya. This complex system of classification of work permits allows for simple and straightforward legal framework and administration processes. This is unlike the Kenyan system, which administers only two types of work permits, issued on an annual basis, and has resulted in unclear modes of administration that has promoted vices such as corruption and has discouraged foreigners from applying for work permits. The duration of work permits ranges from one (1) month to five (5) years. This flexibility allows a worker to apply for a work permit on a definite time period, unlike Kenya, where the permits are issued on an annual basis, and subsequently results in loss of productivity.

An analysis of the United Kingdom model shows that every person with skill or professional level qualification is can be given a work permit, with the exception of manual work. This liberalized system allows for ease of transfer of knowledge and productivity. Kenya, on the other hand, requires that work permits be granted only to those workers who can demonstrate that they possess unique set of skills, resulting in a very conservative position on the Kenyan front, which does not allow for free exchange of ideas with workers from other jurisdictions. It is important to note that while a foreign worker may have similar qualifications as to the Kenyan one, the different experiences that the foreign worker brings inevitably means that there is a lot to be gained by liberalizing the labour market for foreigners, especially for those who possess ascertained skill sets. This liberalization allows will allow for easier transfer of technology, and

will encourage more foreign workers, with advanced skills, to apply for work in the Kenyan economy.

4.4 Conclusion

This chapter reviewed the work permit regimes of South Africa and the United Kingdom and elaborated how the lessons learnt from these countries can be applied to the Kenyan situation in order to improve the work permit regime in Kenya. The lessons identified under the comparative analysis are in response to the gaps and challenges and challenges facing work permit regime to include: a review of the system of classification of work permits; review of the duration of work permits; the liberalisation of the work permit regime; and the introduction of new modes of work permits issued upon arrival at the points of entry into the country.

Chapter five concludes the study and analyses with more depth the recommendations obtained from the study of the South African and United Kingdom systems in order to propose legal, policy and institutional reforms for the improvement of the work permit processes in Kenya, ostensibly to respond to the gaps and challenges bedevilling the work permit regime.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

Conclusion

This study sought to establish the effectiveness of the work permit regime as contained under the Kenya Citizenship and Immigration Act 2011, and whether the objectives of work permits had been attained had been attained. The specific objectives pursued under this study included conducting: an analysis of the existing legal framework on the issuance of work permits in Kenya, and how this legal framework had evolved over the years; an analysis of the gaps and challenges facing the implementation of the work permit regime in Kenya; and a comparative analysis with work permit regimes of South Africa and United Kingdom with a view of extracting recommendations for the betterment of Kenya's work permit regime.

Chapter one provided the introduction to this study. Chapter two analysed the historical evolution of the work permit law and concluded that, while it was clear that Kenya's has an existing work permit regime, the same is rooted in colonial underpinnings and is not well suited for the management of the work permit needs of today. Furthermore, over the years, very little attention has been dedicated to address and update the legal framework of the work permit regime. Work permit law, therefore is in need of overhaul.

Chapter three reviewed the work permit regime in Kenya in light of its practical application. It highlighted gaps of law and challenges in work permit regime, which included: restrictive practices in the issuance of work permits to foreigners; challenges arising out of the complexity of legal and institutional framework in implementation of the work permit regime; and lengthy procedures involved in the issuance of permits which discourage foreigners from applying for

work permits using the formal processes while encouraging corrupt behaviour among officials charged with the responsibility of issuing work permits; among other institutional challenges.

Chapter four reviewed the work permit regimes of South Africa and the United Kingdom and elaborated how the lessons learnt from these countries can be applied to the Kenyan situation in order to improve the work permit regime in Kenya. The lessons identified under the comparative analysis were in response to the gaps and challenges and challenges facing work permit regime, which included: review of the system of classification of work permits; review of the duration of work permits; the liberalisation of the work permit regime; and the introduction of new modes of work permits issued upon arrival at the points of entry into the country.

As a conclusion therefore, it is clear that the work permit regime, as currently constituted, does not effectively protect employment opportunities for Kenyan citizens, combat the employment of illegal immigrants, and does not promote the transfer of skills from foreign nationals to locals who may be lacking the specialized skills that warrant the employment of foreigners as expatriates. The immigration laws are therefore deficient and inadequate in achieving the objective of protecting the local labour market, and as such, need to be reformed to make them responsive to the needs of the Kenyan labour market.

Recommendations

These recommendations of reforms to the Immigration and Work Permit regimes have been gathered from the analysis of work permit data gathered in chapter three of the study and from the comparative analysis of Kenya's regime with that of South Africa and United Kingdom as contained in chapter four. The implementation of these reforms will go a long way in ensuring

that the work permit regime is modernized to be at par with those of developed economies, while ensuring that there is a free flow of labour into the country to promote and facilitate development and transfer of skills from the expatriate labour force to the Kenyan labour force. Also important is the need to ensure that the Kenyan labour market is adequately prepared to take up the jobs that the expatriate community is providing, while ensuring that the high standards provided by the community is maintained. The recommendations have been classified under legislative, policy, and institutional reforms.

Policy Reforms

From the analysis of the study finding, it is clear that there is limited funding to the labour department to conduct continuous, in-depth studies to the labour requirement of the country in order to update and advise the immigration and work permit departments on the required labour force. While the Act envisaged that the labour department conducts these studies every two years, the last study of the labour market needs was conducted seven years ago. This lapse was occasioned by limited budgetary allocation by the government to carry out their statutory mandate. To overcome this challenge, the government should be mandated to include funding of labour market needs into its annual budget, and prioritize this study into the labour market, and the labour department, in the same way other key departments in the country, such as health services and education, are prioritized. This additional funding is also necessary to provide for compliance testing and continuous monitoring of the labour market needs to ensure that they are in alignment with statutory and market demands.

It is necessary for the labour department to relax its requirement on the admission of low cadre workers by both the multinational companies and local companies. Some of the low cadre workers possess unique advantages that cannot be equated distinctly, and analysed in a foxed

manner, in terms of the specific skill set required. While the labour department sometimes prevents lower cadre employees of smaller companies from getting into the Kenyan market, bigger companies, including multinationals, foreign companies and foreign governments, have an easier way in bringing in these workers because of their comparative higher bargaining power. The policy of allowing lower cadre workers into the country should therefore be relaxed and made uniform for the both the bigger and the smaller organizations.

The cost of applying for work permits is also prohibitive in some instances. The cost of work permits should be based on the amount of income a foreign worker is expected to earn, rather than a fixed amount, regardless of the income level of a worker, as is the current scenario. The work permit fees should be abolished for the very lower cadre of workers, and the rate gradually increased upwards depending on the earnings of the foreign worker, and in relation to the complexity of the skill set and compliance to the regulatory requirements.

There is need to explore the option of engaging foreign expatriates mostly as investors and not as employees. This would require them to apply Class C work permits meant for foreign investors. This in an ideal situation deals with two critical solutions; protecting jobs for the local population and anchoring foreign investment into the country. The Immigration department can introduce a quota system for corporations dealing with foreign expatriates, offering only a particular number of work permits. This would limit the number of foreign expatriates an entity can absorb under work permits.

Institutional Reforms

It was clear from the analysis that the Immigration department lacked a proper mechanism of monitoring whether transfer of skill, knowledge and technology was undertaken by the expatriate

labour force. Based on the study, the department relied on questionnaires of intending and existing applicants in order to collect information regarding the labour gaps in the market. Information obtained in this manner is unreliable, and cannot should not be used to make substantive policy decisions on immigration needs of the country because of the erratic and subjective nature of such information. Ideally therefore, with additional funding, the immigration department should hire more officers and devolve the function of monitoring of labour market needs (and the monitoring of transfer of knowledge from expatriates to Kenyan understudies) to counties and constituency level, and use the information obtained at these levels to make substantive decisions on labour requirements and how the gaps in the labour market can be filled.

Legislative Reforms

Equally on the class D investor permits, there is need to harmonize the Investment Promotion Act of 2004 and sections 40 and 41 of the Immigration Act on the minimum capital investors are mandated to inject as a precondition of being issued with work permits.

Through amendments to the Kenya Citizenship and Immigration Act (No 12 of 2011), foreign workers should be mandated to fill questionnaires and surveys, on a quarterly basis, on the steps they have taken to ensure there is a transfer of skill from to the local work force in order to ensure there is a complete transfer of skills, and as a requirement for the renewal of work permits. The immigration and labour departments should equally carry out these surveys, independent of the questionnaires and surveys by foreign workers, to ensure there is a substantive transfer of skills to the Kenyan market.

Arising from the number of times an expatriate worker should renew their work permits, the Kenya Citizenship and Immigration Act (No 12 of 2011) should be amended to place a cap on

the maximum times a foreign worker should apply for work permits to ensure complete transfer of technology and knowledge to Kenyans. From the analysis of data provided in chapter three, this period can be set at five years, and if a foreign worker desires to continue working in the county, they should be compelled to seek permanent residence or citizenship in Kenya. Corporations, also, ought to be given a limit of the number of times they should seek to hire expatriate workers for the same position. It should be strictly provided that work permits should not be provided for the same position within a corporation for periods that exceed more than five years. Corporations should also be allocated quotas in order to limit and regulate the amount of expatriates that the corporations can engage with at any specific time.

Finally, through amendments to the Kenya Citizenship and Immigration Act (No 12 of 2011) Kenya should establish a database for all expatriates and foreigners living and working in Kenya. It should ensure that the data capture process is not lengthy and even if it is, the ministry ought to ensure smooth transmission of responsibility and ensure that one gets the required work permit within a short and reasonable time, and upon arrival at the point of entry into the country. This flexibility and facilitation can be obtained in a number of ways: through the creation of three months' work permits issued immediately upon entry into Kenya by foreign workers in order to allow them start working, rather than subject them to the process of looking for work permits upon arrival, and thereby wasting valuable time that could be put into economic development; the creation of different categories of work permits to provide of the complexity of labour market, rather than the two existing classes of work permits, while ensuring that the cost of obtaining these work permits is not prohibitive or unnecessarily difficult in order to allow for smooth transition of labour market into Kenya, and to limit attendant vices such as corruption in the immigration and labour departments; and to issue work permits with different durations

based on the expected stay and complexity of the work to be undertaken, this duration could, and should vary from 3 months to 60 months, upon which an expatriate should be required to apply for permanent residence or take up citizenship in Kenya.

Like in the United Kingdom, Kenya should go into the mode of liberalizing work permit regimes, giving work permits for all types of jobs, except manual jobs. This allows for free movement of labour into the market, and injection of new ideas into Kenya, and the law should only require that work permits be given a fixed maximum amount of time the same could be issued to an organization for the same position, or to a person performing a specific task.

BIBLIOGRAPHY

Books and Book Chapters

Baranson J, *North-South Technology Transfer: Financing and Institution Building* (Lomond Publications, Inc 1981)

Bentham J, 'An introduction to the Principles of Morals and Legislation' (University of London 1782).

Cross C., Wentzel M. and others, *Migration Management Challenges in South Africa: The next Ten Years*. (HSRC Press 2009).

Babbie E, *The Practice of Social Research* (Oxford University Press 2001).

Gee S, *Technology Transfer, Innovation, and International Competitiveness* (John Wiley & Sons 1991).

Gibson V. D and Smilor W. R, *Technology Transfer in Consortia and Strategic Alliances: Technology Transfer in Knowledge-Intensive Organizations* (Rowman & Littlefield Publishers, Inc 1992).

Greg P and Wadsworth J, *The Labour Market in Winter: the State of Working Britain* (Oxford University Press 2011) 84.

Hobbes J, *Leviathan* (1651).

Locke J, *Two Treatises on Government and a Letter Concerning Toleration* Yale University Press (2003).

Mill J, *On Liberty*, ed Gertrude Himmelfarb (Harmondsworth: Penguin Books 1974).

Morehouse R and Maykut P, *Beginning Qualitative Research. A Philosophic and Practical Guide* (The Falmer Press 1994).

Neuman W.L, *Social Research Methods: Qualitative and Quantitative Approaches* (3rd Edition, Allyn and Bacun 1997).

Plato, *Five Dialogues* Hackett Publishing Company (1981).

Rousseau J, 'Discourse on the Origin and Foundations of Inequality Among Men' (1755).

Saggi K, *International Technology Transfer to Developing Countries* (Formara Ltd 2004).

Vertovec S, *Transnational Networks and Skilled Labour Migration* (Gottlieb Daimler-und Karl Benz-Stiftung 2002).

Journal Articles and Conference Papers

Arap Moi D, “Statement on Application of the New Immigration Act in Relation to ‘Work Permits’ and Kenyanization” (Oxford University Press 1968).

Clarke J and Salt J, ‘Work Permits and Foreign Labour in the UK: A Statistical Review’ (Labour Market Trends 2003).

Driscoll E. R and Wallender W. H, “Controlling International Technology Transfer: Policy Perspectives and Implications, Control and Incentives for Technology Transfer: A Multinational Perspective” (Pergamon Press 1981).

Chi-Yung (Eric) Ng and John Whalley, ‘Visas and Work Permits: Can GATS/WTO Help or Is a New Global Entity Needed?’ (University of Western Ontario 2004).

Klotz A, “South Africa as an Immigration State” (Politikon 2012).

Pearson R and Morrell J, ‘Knowledge Migrants: The Motivation and Experience of Professionals in the UK on Work permits (European Migration Network 2007).’

Perrez F, ‘The Relationship between “Permanent Sovereignty” and the Obligation Not to Cause Trans boundary Environment Damage’ (Environmental Law 1996).

Wocke A and Klein S, ‘The Implications of South Africa’s Skills Migration Policy for Country Competitiveness’ (Development Southern Africa 2002).

Newspapers and Other Internet Sources

Enterprise Europe Network, *Work Permit Regimes in Europe* (London 2010). Available at <http://www.londonchamber.co.uk/docimages/7035.pdf>.

Expatriate Guide, ‘Requirements for Foreigners to Live and Work in Kenya’ (2016) Available at <http://www.expatriate.com/en/guide/africa/kenya/1775-requirements-for-foreigners-to-live-and-work-in-kenya.html>> accessed October 2016.

United Nations, ‘International Covenant on Economic, Social and Cultural Rights’ (United Nations General Assembly 1966) <<http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> accessed 22 October 2014.

Ouma Wanzala ‘Kenya: Foreigners Risk Losing Jobs as Govt Enforces Tough Work Permit Law’ *All Africa* <http://allafrica.com/stories/201606220416.html> .


United States Department of States, ‘Diplomacy in Action’ (United States Department of State 2014). Available at. <https://www.state.gov/documents/organization/229096.pdf> accessed June 2016.

United States, ‘Kenya Country Commercial Guide’ (United States 2015). Available at, <https://www.export.gov/apex/article2?id=Kenya-Executive-Summary> accessed July 2016.

Victor Ogalo ‘Achievements and challenges of implementation of the East African Countries’ (2014). Available at <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/Papers/CMP%20Implementation%20in%20Kenya.pdf> accessed October 2016.

APPENDICIES

Appendix 1: University of Nairobi Letter as Bona Fide Student



UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES & SOCIAL SCIENCES
SCHOOL OF LAW, PARKLANDS CAMPUS
OFFICE OF THE DEAN

Telephone: 254-020- 2314371-5
Cell Phones: 0724-922 608/ 0734-273 568
Fax: 254-020-3744284
E-mail: deanlaw@uonbi.ac.ke

P.O Box 30197
00100 G.P.O,
Nairobi,
Kenya.

25th May, 2016

NATIONAL COMMISSION FOR SCIENCE,
TECHNOLOGY & INNOVATION,
UTALI HOUSE, 8TH & 9TH FLOOR,
P.O BOX 30623, NAIROBI

Dear Sir/Madam,


RE: RECOMMENDATION TO UNDERTAKE LLM THESIS RESEARCH:
RICHARD KIPKORIR CHERUYOT- 062/67787/2013

Reference is made to the above.


The above named student is a bona fide LLM student at University of Nairobi, School of Law. He is currently undertaking a research for his Master of Laws Programme (LLM) on the topic: *Work Permit Regime in Kenya: A Critique of Section 46 of the Kenyan Citizenship & Immigration Act No. 12 of 2011.* He seeks to undertake a brief questionnaire type of research at the Industrial Department, Ministry of Labour and KENINVEST.

Any assistance accorded to him will be appreciated.

Yours faithfully,




NOEL MANYENGE
SENIOR ADMINISTRATIVE ASSISTANT
SCHOOL OF LAW



Appendix 2: NACOSTI Research Permit

THIS IS TO CERTIFY THAT **MR. RICHARD KIPKORIR CHERUIYOT** of THE UNIVERSITY OF NAIROBI, 0-30100 Eldoret, has been permitted to conduct research in Nairobi County on the topic: **WORK PERMIT REGIME IN KENYA: A CRITIQUE OF SECTION 40 OF THE KENYAN CITIZENSHIP & IMMIGRATION ACT NO. 12 OF 2011** for the period ending: **30th June, 2017**


Permit No.: **NACOSTI/P/16/B1072/11933**
Date of Issue: **1st July, 2016**
Fee Received: **Ksh. 1000**




Sammy B. O. Ombaka
Director General
National Commission for Science, Technology & Innovation

Applicant's Signature: _____


1 / 1



Appendix 3: Department of Immigration Research Authorization

| | |
|--|--|
|  MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT DEPARTMENT OF IMMIGRATION | |
| <small>E-mail: dir@immigration.go.ke TEL: + 254-20-272222 FAX: + 254-20-272711</small> | |
| <small>Upper House, P.O. Box P.O. Box 3011-00100 NAIROBI, KENYA</small> | |
| TO: ADIS/TRAINING | FROM: INVESTIGATION & PROSECUTION |
| DATE: 3rd May 2016 | REF: IMM/3/5TF(34) |
| <p>RE: RESEARCH QUESTIONNAIRE BY RICHARD KIPKORIR CHERUIYOT IN REGARD TO WORK PERMIT REGIME IN KENYA: A CRITIQUE OF SECTION 40 OF THE KENYA CITIZENSHIP & IMMIGRATION ACT</p> <p>Sir, I have perused the research questionnaire and I do not find any reason why the department should assist / facilitate the Master of Laws student in conducting his research.</p> <p>I wish to point out that several researches in regard to work permits/ immigration issues have been done by our officers who are studying Master degrees in various universities without any adverse outcomes. This research may be important to the department especially in improvement of legislation regarding issuance of work permits.</p> <p>It is necessary to request and encourage researchers who cover immigration related issues in their theses to submit their finding to us to enable us note areas of concerns especially where they have been assailed by the department in their data collection.</p> | |

The only caution that should be observed is that the questionnaires should be distributed to officers / sections that are conversant with procedures of work permit applications to avoid situations where the questionnaire are filled by officers who are not well conversant with the requirements of work permit applications.


Samuel Kariuki
For: P.I.O/F

Appendix 4: Consent Form

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

CONSENT FORM

NAME: Richard Kipkorir Cheruiyot

REGISTRATION NO.: G62/67787/2013

RESIGNATION: Masters of Laws Student, Parklands School of Law

CONTACT ADDRESS: Nairobi

MOBILE NO.: 0721625777

PROJECT TITLE: Work Permit Regime in Kenya: A critique of Section 40 of the Kenya

Citizenship & Immigration Act No. 12 of 2011

Please Tick

- | | | |
|----|--|--------------------------|
| 1. | I confirm that I have read and understand the information sheet for the above study and have had the opportunity to ask questions. | <input type="checkbox"/> |
| 2. | I understand that my participation is voluntary and that I am free to withdraw at any time, without giving reason. | <input type="checkbox"/> |
| 3. | I agree to take part in the above study. | <input type="checkbox"/> |
| 4. | I agree to the use of anonymised quotes in publications | <input type="checkbox"/> |

| | | |
|---------------------|------|-----------|
| Name of Participant | Date | Signature |
|---------------------|------|-----------|

| | | |
|--------------------|------|-----------|
| Name of Researcher | Date | Signature |
|--------------------|------|-----------|

Appendix 5: Sample Research Questionnaire

RESEARCH QUESTIONS FOR DEPARTMENT OF IMMIGRATION ON EFFECTIVENESS OF SECTIONS 40 & 41 OF THE KENYA CITIZENSHIP & IMMIGRATION ACT NO. 12 OF 2011

1. What measures does the department have in place to ensure that expatriate knowledge is transferred to the local workforce?
2. How does the department ensure compliance with the above measures?
3. In your opinion, are the measures sufficient and effective?
4. Does the department have a mechanism for evaluating expatriate performance periodically or at the end of the permitted period?
5. If yes to the above, are these measures sufficient and effective?
6. What informs the department's decision as to whether or not to renew work permits?
7. Are there possible legislative changes needed to ensure compliance of sections 40 & 41 of the Act? Any possible recommendations?

Appendix 6: List of Respondents

1. Mr Lihasi R.E. – Department of Immigration
2. Mrs Hellen Kamuren – KenInvest Corporation
3. Mrs Edith Okoki – Ministry of Labour
4. Mr Wei G. – Expatriate (Chinese national)
5. Mr Liu C. – Expatriate (Chinese national)
6. Mr Chelulei J. – Department of Immigration